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The constitutional authority of the President to commence hostilities without a Congressional declaration of war.

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THE CONSTITUTIONAL AUTHORITY OF THE PRESIDENT TO COMMENCE HOSTILITIES WITHOUT A CONGRESSIONAL DECLARATION OF WAR

A Dissertation Presented

By .

BARRY LATZER

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Political Science

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ABSTRACT

The Constitutional Authority of the President to Commence Hostilities Without a Congressional Declaration of War

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This study examines Presidential authority to order United States armed forces to participate in major armed hostilities in the absence of a Congressional declaration of war.

The study is based upon an analysis of (1) the views of the Framers of the Constitution, (2) actual practice as revealed by seven significant undeclared "wars" over the course of American history, (3) the views of the United States Supreme Court, which are, of course, authoritative regarding the meaning of the Constitution, and (4) statutory limitations upon the President, with special emphasis upon the War Powers Resolution of 1973.

Relying upon post-Constitutional Convention commentaries, it was found that Congress and not the President was intended to have the power to initiate war (as opposed to hostilities short of war) except in cases of attack upon the nation.

Congressional power was affirmed in the undeclared Naval War with France (1797-1800), in which the legislature authorized in advance the conduct of hostilities.

In the Barbary conflicts of 1801-1802 and 1815, Presidents ordered the navy abroad in shows of force without Congressional authority, and although Congress authorized hostilities, the authorizations delegated broad discretionary powers to the President.

The Boxer Expedition of 1900 was the paradigm case of the introduction of troops into hostilities on sole Presidential authority in order to protect Americans abroad.

In the Tampico incident of 1914, President Woodrow Wilson ordered the blackade of a Mexican port simultaneous with a resolution of support from Congress. In 1916, Wilson again sent troops to Mexico following Poncho Villa's raids on American border towns, and although the legislature was not informed in advance, it gave indirect approval.

Wilson was also President during the north Russian and Siberian interventions of 1918. These interventions grew out of the First World War but were aimed at Japan and the Russian communists rather than Germany, the declared enemy.

The Korean War (1950) was conducted without reliance upon either treaty or statute, although the United States was carrying out United Nations resolutions, and Congress appropriated money and drafted troops to conduct the war.

Although some believed the Vietnam War to have been begun on sole Presidential authority, the Tonkin Gulf Resolution and the Southeast Asia Treaty provided Congressional authorization for the initiation of the conflict after 1964.

The 1973 War Powers Resolution attempts to restrict Presidental authority to introduce troops into hostilities or imminent hostilities,

but probably encroaches upon the President's powers as the Commander in Chief.

The Supreme Court has not yet authoritatively decided where the line between Presidential and Congressional war-commencing authority should be drawn. Although the Court has left open the possibility that such an issue could be decided in future cases, it does not seem likely that such decisions will actually be rendered.

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THE POWER TO MAKE WAR: THE ORIGINAL UNDERSTANDING

Introduction

The Supreme Court justices themselves have not always agreed upon the weight to be attached to the original understanding of the Constitution. Consider Chief Justice Taney's view that

> it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers...[1]

Contrast Mr. Justice Frankfurter's assertion in the Steel Seizure Case.

> It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.[2]

Although Taney's formula is too rigid, it is nevertheless essential to a thorough analysis of the meaning of the Constitution that we examine not only its language but the original understanding of its authors.

What was meant by the Framers when they empowered Congress "To declare War," "To raise and support Armies," and "To provide and maintain a Navy," "To make Rules for

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[1]Dred Scott v. Sandford, 19 How. (U.S.), 393, 426 (1857).

[2]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1951).

the Government and Regulation of the land and naval Forces," and "To provide for calling forth the Militia to...repel Invasions?"[3]

And what further was meant by the statesmen who wrote the following? "The executive Power shall be vested in a President of the United States of America." "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual service of the United States." "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls..." And finally, "he shall receive Ambassadors and other public Ministers: he shall take Care that the Laws be faithfully executed."[4]

In order to interpret these phrases from the Constitution we will examine not only the debates within the Constitutional Convention, but also law and practice prior to the Ratification of 1789, and significant commentary upon the issue immediately thereafter. We turn first to the period preceding the Constitution.

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[3]U.S. Const. art. I, sec. 8, cls. 11-13, 15.

[4]Ibid., art. II.

War-Making Before the Constitution

Regarding British practice, Blackstone is unambiguous: the power to commence war is part of the Royal prerogative.

> With regard to foreign concerns, the king is the delegate or representative of his people... In the king, therefore, as in a centre, all the rays of his people are united, and form, by that union, a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king's concurrence is the act only of private men...
>
> Upon the same principle the king has also the sole prerogative of making war and peace...
>
> So that, in order to make a war completely effectual, it is necessary, with us in England, that it be publicly declared, and duly proclaimed by the king's authority; and then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And, wherever, the right resides of beginning a national war, there must also reside the right of ending it, or the power of making peace.[5]

Locke distinguished executive power in domestic matters from the "power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth." This power over external matters Locke termed "federative," and then cautioned against reading too much into the distinction.

> Though, as I said, the executive and federative

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[5] Blackstone's Commentaries by St. George Tucker 5 vols, (1803; reprint ed., Buffalo, N.Y.: Dennis and Co., 1965), 1:252, 257, 258.

> power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons.[6]

In short, Locke considered the power to commence war to properly rest with the same institution charged with the exercise of the executive power.

And in Montesquieu's tripartite scheme of powers, so influential with the Americans, the power to make war is considered executive by its very nature.

> In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.[7]

As Corwin points out, however, acceptance of these views by the Framers of the United States Constitution "was qualified at the outset by the allocation of the war-declaring power to Congress."[8] How great a qualification

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[6]John Locke, Of Civil Government, intro. W.F.Carpenter (London: Everyman's Library, 1947), bk. 2:146,148.

[7]Baron de Montesquieu, The Spirit of the Laws, trans. T. Nugent (New York: Haffner Publishing Co., 1965), bk. 11:6.

[8]Edward S. Corwin, The President: Office and Powers, 1787-1957, 4th rev. ed. (New York: New York University Press, 1957), p. 418.

this was we have yet to discover. It is clear, however, that the European thinkers most influential in America considered war-making an executive function. We must next examine the American colonial governorship.

The British colonies in North America (1607-1775) had, at first, governorships with an ill-defined political role. By mid-18th century, England tightened control over its possessions, and the Crown appointed the governors in eight of the thirteen colonies, and got to approve proprietary appointments in three others. The "royal governor became the primary political link between the King and his colonial subjects."[9]

But the governors did not rule alone; they had to work closely with the colonial assemblies, the upper chamber of which served as the governor's council. The lower chamber held the purse strings, an effective weapon in disputes between the colonists on the one side, and the Crown and its representative, the governor, on the other. Much of the mistrust of executive power in evidence just after independence can be traced to this unhappy colonial experience.[10]

As to military powers, the Royal governors, or "cap-

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[9]Joseph Kallenbach, The American Chief Executive (New York: Harper & Row Publishers, Inc., 1966), p. 4.

[10]Ibid., 5; Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development, 3d ed. (New York: W.W. Norton & Co., Inc., 1963), pp. 34-35.

tains general," as they were often titled, had complete authority over the colonial military force, but usually found themselves dependent upon the assembly for supporting legislation. Furthermore, as subordinates of the Crown, the governors could not declare a colony to be at war, except perhaps against Indians, and then only with advice of Council and immediate notification of the home government.[11]

Following the outbreak of the French and Indian Wars in 1754, Great Britain established a permanent standing army in America to be headed by a Commander in Chief. The latter officer eventually assumed most of the military power heretofore exercised by the colonial governors, as well as becoming the principal administrator of imperial affairs in America. The Commander in Chief and the sizeable force he commanded were increasingly resented by the colonials for what they considered encroachments on their liberties and usurpations of civil authority.[12]

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[11]Leonard Woods Labaree, Royal Government in America: A Study of the British Colonial System Before 1783 (New Haven: Yale University Press, 1930) pp. 92 and note 1, 107-108; Evarts Boutell Greene, The Provincial Governor in The English Colonies of North America (1898; reprint ed., New York: Russell & Russell, Inc., 1966), pp. 105-7.

[12]Labaree, pp. 108-109; Clarence E. Carter, "The Office of Commander in Chief: A Phase of Imperial Unity on the Eve of the Revolution," in Richard B. Morris, ed. The Era of the American Revolution (New York: Columbia University Press, 1957).

In addition to contributing to the causes of the American Revolution, the Commander in Chief and his forces probably convinced the Americans that standing armies were undesirable and that the military must be made subordinate to civilian authority. Under the Constitution, the latter was accomplished by making the President, a civilian, the Commander in Chief.[13]

Turning to the period following the Declaration of Independence, we find thirteen sovereign states, each having weak executives in varying degrees of subordination to their respective legislatures, all loosely bound by the Articles of Confederation after 1781. During the Revolutionary War the state governors exercised power more freely in military affairs than in other areas. With approval of the council (the upper chamber of the legislature; this institution was carried over from the colonial period) a governor could call out the state militia and even assume personal command. Moreover, once the militia was mobilized, the Revolutionary governor, being the commander in chief, had "sole direction of their use."[14]

Although the new states, the colonial experience fresh in mind, intentionally kept their executives weak in

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[13]U.S. Const. art. II, sec. 2, cl. 1.

[14]Margaret Burnham Macmillan, The War Governors in the American Revolution (New York: Columbia University Press, 1943), p. 62; Kallenbach, p. 21.

almost every respect, they uniformly made them commanders in chief. This was in part due to the exigencies of the war; under such pressures the South Carolina legislature once delegated sweeping emergency powers to its executive.[15]

The early state constitutions demonstrate the breadth of military power vested in the governors. Article 9 of the 1776 Delaware Constitution provided that "The president," as it styled its executive,

> with the advice of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them, and the other military force of this State, under the laws of the same.[16]

Article XXVI of the South Carolina charter of the same year is interesting because it is the only state constitution explicitly prohibiting its executive from making war.

> That the president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council.[17]

Contrast the Massachusetts Constitution of 1780, Chapter II, Section I, Article VII, whose words are repeated almost verbatim in the New Hampshire organic law of 1784.

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[15]Kelley and Harbison, pp. 34-35, 96; Kallenbach, pp. 18, 21, 27.

[16]Ben: Perley Poore, ed. The Federal and State Constitutions, Colonial Charters and other Organic Laws of the United States, 2 vols., 2d. ed. (New York: Burt Franklin, 1972), 1:275.

[17]Ibid., 2:1619.

Not only were these executives authorized to personally lead the militia of their respective states, but they were given "full power,"

> for the special defence and safety of the commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof...[18]

The early state governors did not betray the trust reposed in them in regard to military affairs. Furthermore, their general weakness (i.e., in other than military affairs), combined with legislative inefficiency and growing conservative fears of overly-democratic assemblies all served to dissipate the colonial legacy of executive mistrust. In fact, by the time the United States Constitution was written, the pendulum had swung back in favor of increased executive power. Thus it is said that the model for the national presidency was the governorship of New York, the strongest of the state governorships.[19]

That legislative power was feared more than executive at the time of the Framing is evident from Madison's extensive comments on the subject in Federalist No. 48, in which we find the following statement.

> The legislative department is everywhere extending the sphere of its activity and drawing all power into

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[18]Ibid., 1:965. For New Hampshire, ibid., 2:1288.

[19]Charles C. Thach, The Creation of the Presidency 1775-1789, Johns Hopkins University Studies in Historical and Political Science, ser. XL, no. 4 (1922; reprint ed., New York: Da Capo Press, 1969), pp. 49, 51-52, 76.

its impetuous vortex.[20]

And Jefferson, who could not be accused of any conservative bias against popular assemblies, comments in his Notes on the State of Virginia as follows.

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single one. 173 despots would surely be as oppressive as one.[21]

But before we turn our full attention to the Framers' views on executive power, let us examine the forerunner of their handiwork, the Articles of Confederation. Under the Articles, which "governed" the newly independent states from 1781 to 1789, ultimate military power lay with the Congress in which each state had one vote. However, Congress could not "engage in a war," among other significant governmental acts, "unless nine states assent to the same."[22]

On the positive side, the Articles provided the following in regard to war-making.

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[20]Alexander Hamilton, James Madison, John Jay, The Federalist Papers, ed. Clinton Rossiter (New York: New American Library, 1964), p. 309.

[21]Thomas Jefferson, The Portable Jefferson, ed. Merrill D. Peterson (New York: The Viking Press, 1975), p. 164.

[22]Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (New York: Alfred A. Knopf, Inc., 1950), p. 29; Articles of Confederation, art. IX.

> The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article...[23]

The relevant section of the sixth article referred to reads as follows.

> No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted...[24]

Note the use of the phrases "engage in...war," and "determining on...war," as opposed to what appears on its face to be the narrower power to "declare War" vested in Congress by the Constitution. The United States Supreme Court had occasion to comment on the extent of Congress' military powers under the Articles in the case of Penhallow, et. al. v. Doane's Administrators.[25]

Penhallow turned on the authority of certain prize tribunals established by the Continental Congress. In upholding their jurisdiction Justice Paterson commented as follows.

> Congress was the general, supreme, and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system...In Congress were vested, because by Congress were exer-

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[23]Articles of Confederation, art. IX.

[24]Ibid., art. VI.

[25]3 Dall. (U.S.) 54; 1 L. Ed. 507 (1795).

> cised with the approbation of the people, the rights and powers of war and peace...In every government... there must be a supreme power or will; the rights of war and peace are component parts of this supremacy... If it be asked, by whom, during our revolutionary war, was lodged, and by whom was exercised this supreme authority? No one will hesitate for an answer. It was lodged in and exercised by Congress...[26]

Of course, one of the problems with the Articles of Confederation, aside from the fact that too little power was given to the central government, was that they did not provide for an executive branch. Administration was handled at first by ad hoc committees, later reduced in number and supplanted in major areas (e.g., War, and Foreign Affairs) by permanent departments. Still there was "lack of executive unity" with no one agency "to formulate a common policy and control a number of co-ordinated ministries."[27]

This attempt to administer by committees subordinate to Congress "failed, and failed lamentably," and led to the conclusion that a strong separate executive was necessary. This conclusion was reinforced by experiences with state governments during the same period. Thus, the Great Convention aimed at asserting executive strength and independence of Congress. "The idea...that the jealousy of kingship was a controlling force in the Federal Convention," one analyst points out,

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[26]1 L. Ed. 518. See also Mr. Justice Blair's opinion at 1 L. Ed. 531.

[27]Kelley and Harbison, pp. 102, 107.

> is far, very far, from the truth. The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that...it was necessary for them...to secure a strong, albeit safe, national executive.[28]

War-Making and the Constitutional Convention

In the Convention of 1787, those delegates favoring a strong independent executive, modeled after the more powerful of the state governors, generally prevailed. While this gives us a sense of the general course of the Convention with regard to the Presidency, it tells us little about the war-making power in particular.[29]

In its first two months the Convention was preoccupied with the scheme of government outlined in the Virginia Plan. It also considered the alternative New Jersey Plan, a draft by Pinckney of South Carolina, and an able speech by Alexander Hamilton, detailing that statesman's own ideas for a government.[30]

The Virginia Plan provided for the institution of a "National Executive" which "ought to enjoy the Executive rights vested in Congress by the Confederation." On its face this resolution begs the question of the division of war-making power between the Congress and the President, because it is not clear whether the Framers thought such

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[28]Thach, pp. 52, 62.

[29]Ibid., passim.

[30]Kallenbach, p. 37.

power to be executive or legislative in nature.[31]

It will be recalled that Blackstone, Locke and Montesquieu believed war-making to be essentially executive. If the views of these authorities, all well known to the Framers, were accepted, adoption of this resolution would imply the vesting of war-making in the National Executive.[32]

Perhaps this is why some delegates expressed reservations about accepting the resolution when it was introduced to the Committee of the Whole on June 1, 1787. Madison described the proceedings as follows.

> Mr. Pinkney was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace and war which would render the Executive a Monarchy, of the worst kind, towit an elective one.
>
> Mr. Wilson moved that the Executive consist of a single person...
>
> Mr. Rutlidge...said he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace...
>
> Mr. Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office. He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a legislative nature. Among others that of war and peace. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers...[33]

In Georgia delegate William Pierce's account of the same proceedings, Wilson is to have said, in addition:

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[31]Virginia Plan, Res. 7, in Max Farrand, ed. The Records of the Federal Convention of 1787, 3 vols. (New Haven: Yale University Press, 1927), 1:21.

[32]See pp. 3-4, supra.

[33]Farrand, Records, 1:64-6, brackets omitted.

> Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.[34]

And in the notes of Rufus King of Massachusetts, the following is attributed to Madison:

> Mad: agrees wth. Wilson in his difinition of executive powers--executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers shd. be confined and defined...[35]

Thus, among those who spoke to the issue at the Convention that day, none would concede to the Executive the powers of war and peace. This suggests that the Framers were inclined to break with Blackstone, Locke and Montesquieu, although the issue was not resolved that day, and the power to make peace was ultimately vested in the President and Senate in the form of the treaty-making authority.[36]

The New Jersey Plan, which was presented as the small-state alternative to the Virginia Plan, provided for a plural executive (a course rejected early on), with the power, among others,

> to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as to personally conduct any enterprise as General, or in other capacity.[37]

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[34]Ibid., pp. 73-74.

[35]Ibid., p. 70.

[36]U.S. Const. art. II, sec. 2, cl. 2.

[37]Farrand, Records, 1:244.

Under the New Jersey Plan, Congress was to retain all powers vested in it by the Articles of Confederation, except where expressly modified. This implies that the direction of foreign affairs and the commencement of war, as opposed to the direction of military operations, were to remain within the power of Congress.[38]

Pinckney's Plan, the most detailed of those discussed so far, modeled its section on the executive after the New York State Constitution. The Pinckney draft was used by the Committee of Detail (discussed below) in the preparation of much of what came to be article II of the United States Constitution.[39]

Pinckney's article 7 provided that "The Senate shall have the sole and exclusive power to declare War." His eighth article vested the "Executive Power...in a President," and provided that "He shall be Commander in chief of the army & navy of the United States & of the Militia of the several states."[40]

Hamilton's proposals were not formally before the Convention, but were outlined in a speech in opposition to the New Jersey Plan. His ideas are interesting because he was an advocate of a strong executive, and later, writing

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[38]See New Jersey Plan, Res. no. 2, ibid., p. 243.

[39]Max Farrand, The Framing of the Constitution of the United States (New Haven: Yale University Press, 1962), p. 129.

[40]Farrand, Records, 3:599-600.

under the pseudonym "Pacificus," argued for extended Presidential power in foreign affairs.[41]

In the course of his address to the Convention of June 18, 1787, Hamilton suggested that the Executive "have the direction of war when authorized or begun," but that the Senate "have the sole power of declaring war."[42]

One plausible interpretation of the phrase "authorized or begun," is that the President was only to direct wars "authorized" by Senatorial declaration of war or "begun" by foreign invasion of the United States, in which case the President may act without waiting for a declaration. This interpretation suggests: (1) that Hamilton did not wish the President to have the power to commence hostilities except in defense against attack, and (2) that he understood the term "declaring" war to mean "authorizing" it.[43]

Whatever Hamilton meant, it is nevertheless true that his plan provoked neither discussion nor support. The Convention moved into its second phase, in which a five-man Committee of Detail carefully wove excerpts from the Pinckney and New Jersey plans, and the New York State Con-

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[41]Ibid., p. 617; Farrand, Framing, pp. 87-88. "Pacificus" is discussed below.

[42]Farrand, Records, 1:292.

[43]See Charles A. Lofgren, "War-Making Under the Constitution: The Original Understanding" in Richard A. Falk, ed. The Vietnam War and International Law, 4 vols. (Princeton, N.J.: Princeton University Press, 1968-76), 4:581.

stitution into those elements of the Virginia Plan already approved by the Convention.[44]

It was out of this Committee that the first details of the various war-power provisions appeared. The Committee report, presented to the Convention August 6, 1787, listed among the powers of Congress the power "To make war." At the same time it vested the "Executive Power of the United States...in a single person," to be styled the President. Apparently, the Committee of Style considered the power to "make war" legislative as opposed to executive in nature, or at least better left in the hands of Congress. The reported draft authorized the President to "receive Ambassadors," and provided that "He shall be commander in chief of the Army and Navy of the United States, and of the Militia of the Several States." But the Senate alone was authorized to "make treaties."[45]

All through August, 1787, the draft of the Committee of Detail was reviewed by the whole Convention, article by article, clause by clause.[46] It was during this process, on August 17, that the most important exchange of all regarding war-making took place. Below is reproduced Madison's account of the debate as it appears in Farrand's Records of

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[44]Farrand, Framing, pp. 89, 125-126, 128-129.

[45]Farrand, Records, 2:182, 183, 185.

[46]Farrand, Framing, p. 134.

the Federal Convention. The editor's notes and brackets are omitted.

"To make war"

Mr Pinkney opposed the vesting this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one-authority to make war, and another peace.

Mr Butler. The Objections agst the Legislature lie in a great degree agst the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.

Mr Madison and Mr Gerry moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks.

Mr Sharman thought it stood very well. The Executive shd. be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.

Mr Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. Elseworth. there is a material difference between the cases of making war, and making peace. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negociations.

Mr. Mason was agst giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "declare" to "make".

On the Motion to insert declare--in place of Make, it was agreed to.

N.H. no. Mas. abst. Cont. no.* Pa ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. ay. Geo-ay.

Mr. Pinkney's motion to strike out whole clause, disagd. to without call of States.

Mr Butler moved to give the Legislature power of peace, as they were to have that of war.

Mr Gerry 2ds. him...[47]

The last motion failed, 10-0, and then the Convention adjourned for the day. The asterisk following Connecticut's vote on the motion to substitute "declare" for "make," refers to an interesting footnote of Madison's. It reads as follows.

> *On the remark by Mr. King that "make" war might be understood to "conduct" it which was an Executive function, Mr. Elseworth gave up his objection and the vote of Cont was changed to--ay.[48]

With Connecticut voting in the negative, the vote total was 7-2; with Connecticut in the affirmative it was 8-1. Indeed, in Madison's original Journal of the Convention, and in his separate "Detail of Ayes and Noes," he shows that the motion was voted upon twice. However, the vote tallies show that the motion lost on the first vote, 4-5, while gaining 8-1 approval the second time. There is no separate record of a 7-2 vote.[49]

It should also be noted that Madison's recording of the vote breakdowns in the original Journal and in the Detail of Ayes and Noes was sometimes innaccurate, sometimes difficult to understand. Furthermore, if two separate votes took place, as seems likely, we don't know when during the debates they occurred, since in the full account

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[47]Farrand, Records, 2:318-319.

[48]Ibid., p. 319.

[49]Ibid., p. 313.

(quoted above) only one vote is recorded along with Connecticut's switch.[50]

Lacking this information we cannot say for sure what led the delegates to approve the measure to substitute "declare" for "make." Was Connecticut alone persuaded by the argument that "make" included "conduct," an executive function; and therefore was this argument in Madison's footnote relatively insignificant?

Or was this the argument that caused a rejected motion to be reconsidered and adopted; in which case it is extremely significant? Since we do not know, and since we do not know the point in the proceedings at which the proposal was rejected (if it was), or approved, we cannot speak with certainty about the intention of the delegates.[51]

But if we cannot draw conclusions with finality because of some uncertainties in the Convention records, can we nevertheless formulate some generalizations from the record available? The opening comment by Pinckney of South Carolina seems clear. Consistent with his own plan of government, he would have vested the war-making power in

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[50]Ibid., pp. xiii-xiv; Lofgren, in Falk, 4:577-578.

[51]Ibid., p. 578. I also find it odd that Massachusetts was recorded as "absent" for both votes even though Gerry, a Massachusetts delegate, cosponsored the proposal. See Farrand, Records, 2:314, 319.

the Senate, rather than the entire legislature as provided for in the Committee of Detail plan.[52]

Pierce Butler, also part of the South Carolina delegation, disagreed, and argued that the war-making power should lie with the President. Butler's was the most forthright claim in behalf of executive war-power, and it is significant in that it was not adopted. It was probably Butler's comment which delegate Gerry said he "never expected to hear in a republic."[53]

Gerry then offered his own proposal, which Madison cosponsored, substituting "declare war" for "make war; leaving to the Executive the power to repel sudden attacks." Next followed the curious comment of Roger Sherman of Connecticut, an early proponent of an executive subordinate to the legislature.[54]

Sherman "thought it stood very well" with the words "make war," and objected to changing it to "declare war" on the grounds that this would narrow Congress' power too much. He may also have felt that the substitute motion would leave to the President the power to "commence war," and this he opposed.[55]

George Mason of Virginia preferred "declare" to

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[52]Farrand, Records, 2:182, 3:599.

[53]Farrand, Records, 2:318.

[54]Farrand, Records, 1:5, 2:318.

[55]Farrand, Records, 2:318.

"make" and did not trust the Executive with "the power of war." Mason apparently believed it would be too easy to go to war if such authority were lodged with the President alone.[56]

Next, Madison records a vote on the motion to substitute "declare," and he footnotes the comment of Rufus King to the effect that "make war" might include the power to conduct war, properly an executive function. The substitute was accepted, perhaps as a result of, perhaps without regard to King's remarks.[57]

Pinckney's motion to strike the whole clause, probably preparatory to a proposal to vest the war-making power in the Senate alone, was then rejected. Also voted down was Butler's motion to give Congress the "power of peace, as they were to have that of war."[58]

Given the doubts about the accuracy of the voting record and the confusion about the point in the debate at which the votes were taken, what minimum conclusions may be drawn from these crucial proceedings?

First, Butler's idea to grant the President sole war-making power was rejected. Gerry spoke against it after having offered his motion to reduce somewhat Congres-

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[56]Ibid., p. 319.

[57]Ibid.

[58]Ibid.

sional war power. Mason also spoke against it while urging adoption of the Gerry motion. Therefore, to its sponsors and supporters, the reduction of Congress' power to "make" war did not thereby vest the very same power in the President. Butler admitted as much following the vote to substitute "declare" for "make" war, when he confessed that the legislature was to have the power of war.

Second, Congressional power was narrowed in some fashion when the Madison-Gerry motion was adopted. Sherman opposed the motion for narrowing the power too much. Gerry wished to transfer to the President "the power to repel sudden attacks," and this certainly was intended. It also seems likely that King's suggestion that the President have authority to conduct war once begun met with general approval.

However, it is not clear, as is sometimes asserted, that this debate demonstrated a desire on the part of the Framers to limit the President to solely the power to repel sudden attacks and to conduct war once begun. The thrust of the motion was to reduce Congressional power to the advantage of the Executive. The extent of the reduction is not entirely clear from this debate.[59]

Third, Pinckney's motion to strike the whole war-power clause, perhaps preliminarily to a proposal to vest

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[59]But see Raoul Berger, "War-Making by the President" in Falk, 4:604.

the power in an institution other than the whole Congress, was rejected. This indicates that the Framers were determined to maintain the power of the legislative branch to declare war.

Beyond the three propositions above, the intent of the Framers is not clear. But of course the crucial question remains unanswered: which agency was empowered to commence or initiate hostilities? Relying upon Congress' powers to declare war, and grant letters of marque and reprisal, Lofgren concludes that "Congress would have nearly complete authority over the commencement of war."[60]

Lofgren reasons that undeclared wars were common enough at the time of the Framing so that the Founders would not "leave such an important power unvested." In addition, the practice of issuing letters of marque and reprisal had fallen into disuse by the time Article I, section 8, clause 11 was established. He therefore finds it "plausible" that the letters of marque clause was designed to give Congress (as opposed to the President) whatever war-commencing power did not inhere in the declaration of war clause.[61]

However, Lofgren offers no evidence to substantiate his interpretation of the letters of marque and reprisal clause, and I could find none in the record of the Conven-

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[60]U.S. Const. art. I, sec. 8, cl. 11; Lofgren, in Falk, 4:601.

[61]Lofgren, in Falk, 4:594-8.

tion proceedings. Furthermore, he admits that the great European treatises on international law, with which the Framers were familiar, distinguished between declared or "perfect" wars and undeclared or "imperfect" wars. In adopting the word "declare" in the Constitution, the Framers may well have been using the word in this narrow sense, thus limiting Congress' power to "perfect" wars alone.[62]

The fact is that a number of contradictory interpretations are compatible with the evidence discussed so far; and that is because the evidence we have reviewed up to this point does not enable us to conclude with certainty which branch was empowered by the Framers to initiate hostilities.

Unfortunately, the "make/declare war" debate was the last significant act of the Constitutional Convention with respect to Presidential war-making power. Most of the pertinent Presidential powers (e.g., executive power, commander-in-chief, and power to receive ambassadors) had been recommended by the Committee of Detail and did not generate controversy.[63]

The only modifications in the work of the Committee

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[62]Ibid., 590-3. See Eugene V. Rostow, "Great Cases Made Bad Law: The War Powers Act" in Falk, 4:768-769.

[63]See p. 18, supra.

of Detail with respect to Presidential war powers were as follows.

1. His powers as Commander in Chief of the State militia were restricted. They were only to take effect when those forces were "called into the actual service of the United States."[64]

2. Presidential power over foreign affairs was extended. The power to make treaties, which had been lodged in the Senate alone, was transferred to the President, with the proviso that the Senate give its "advice and consent," and that two-thirds of the Senators present approve the treaty.[65]

The Federal Convention completed its work in September, 1787, without any further debate over the issues concerning us. The debates we have examined reveal precious little about the Framers' intentions with regard to the commencement of war. Perhaps it is best to withhold our conclusions until after we have analyzed post-Convention commentaries on the subject. It is to these commentaries that we now turn our attention.

Post-Convention Commentaries on War-Making

By far the most famous of commentaries upon the newly fashioned American system of government were those essays

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[64]Farrand, Records, 2:426-427.

[65]Ibid., pp. 498-499.

by Hamilton, Madison and John Jay, known collectively as The Federalist. And yet here too are few words about war-making.

There is Hamilton's comment in the 23rd paper to the effect that national security powers "ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies..." But this was hardly a plea for unlimited Presidential or Congressional war power; it was rather a brief for federal power over national defense unhampered by state interference.[66]

In No. 41, Madison contents himself with the conclusion that the power of declaring war is necessary, and needs no defense, and so he never considers the relative roles of the President and Congress in war-making.[67]

The 69th essay is, for us, the most interesting. Here Hamilton draws a comparison between the war powers of the Presidency on the one hand, and the war powers of the British monarch and certain state governors on the other.

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval

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[66]Rossiter, Federalist Papers, p. 153.

[67]Ibid., p. 256.

> forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies--all which, by the Constitution under consideration, would appertain to the legislature.[68]

In this view, the President, as Commander in Chief, is no more than a top military officer, with power to make major decisions in war-time, but without the power to declare war. While Hamilton does not say that the President may never commence hostilities, the narrow definition of his Commander in Chief powers suggests that he may not do so under that authority. Or, to state the same thing differently, the President's powers as Commander in Chief do not provide him with authority to commence war.[69]

It should be kept in mind that this is the view of the same "Publius" who extolled the virtues of a "vigorous executive" in Federalist No. 70. "Energy in the Executive," declared Hamilton,

> is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks...[70]

But was executive "energy" to be displayed in the initiation of hostilities without a declaration of war? "Publius" does not say; but when he enumerates the various administrative activities to be superintended by the Pres-

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[68]Ibid., pp. 417-418, footnote omitted.

[69]Corwin, The President, p. 228.

[70]Rossiter, Federalist Papers, p. 423.

ident, no such power is listed.

> The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war--these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.[71]

Nowhere in this list, and nowhere in The Federalist is it suggested that the President may commence war on his own authority. And Hamilton's treatment of the Commander in Chief clause in the sixty-ninth paper suggests by implication that the President has no such power.

All told, the Federalist is not very helpful. When we turn to the debates in the state conventions considering adoption of the Constitution, we find one James Iredell, delegate to the North Carolina convention reiterating the Hamiltonian view. Iredell thought Presidential military powers comparable to those of the state governors, but not to the king of England.

> The President, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded. A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also the authority to declare war. The President has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are

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[71]Alexander Hamilton, Federalist No. 72, in Rossiter, Federalist Papers, pp. 435-436.

> vested in other hands. The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature...72

At the South Carolina convention, Pierce Butler, who, it will be recalled had suggested at Philadelphia that war-making be vested in the President, described the rejection of his proposal as follows.

> It was first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.73

One William Wilson, delegate to the Pennsylvania convention, urged the adoption of the Constitution for these reasons.

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.74

Wilson's comment is interesting because he uses "in-

72Jonathan Elliot, ed., The Debates in the several State Conventions, on the adoption of the Federal Constitution, as recommended by the General Convention at Philadelphia, in 1787, 2d ed. 5 vols (Philadelphia: J.B. Lippincott Co., 1863-1891), 4:107-108.

73Ibid., p. 263.

74Elliot, Debates, 2:528.

volve us in" war and "declaring war" interchangeably, thereby suggesting a broad construction of the Congressional power to declare war. But the testimony of a single delegate is not much to go by, and the debates in the state conventions seem to have offered no other pertinent remarks. (New York proposed two Constitutional amendments, one requiring a two-thirds vote in Congress for a declaration of war; the other prohibiting the President from personally assuming command of an army in the field. Neither were adopted.)[75]

Events in Washington's administration soon provided the backdrop for further elucidation of the President's powers in foreign affairs. Since the occasional papers surrounding these events are so close to the framing of the Constitution in time, and involve some of the same personages, they may be considered a part of the views of the Framers.

The event was President Washington's Proclamation of 1793, issued on Presidential authority, calling for neutrality (although it shunned the word) on the part of the United States in the war between France and England. Pro-French sympathizers considered the Proclamation an unwarranted "tilt" toward Great Britain, thus inspiring Hamilton, writing as "Pacificus," to publish a series of newspaper articles de-

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[75]Elliot, Debates, 1:330.

fending the Proclamation.[76]

"Pacificus" No. 1 aims at setting out the constitutional basis for the President's action in response to the charge that Congress' power to determine on peace and war as established by Article I, Section 8, Clause 11 had been usurped. Hamilton's defense rests upon the proposition that Article II, Section 1, Clause 1, "The executive Power shall be vested in a President of the United States of America," is an affirmative grant of general power to the President.[77]

This broad undifferentiated grant of power is only partially detailed in the remainder of Article II, which, along with other parts of the Constitution (e.g., Article I, Section 8, Clause 11), contains certain exceptions to this power. Finally, since a proclamation of neutrality is "merely an Executive Act" the President was warranted in issuing same.[78]

As for the charge that Congress' power to declare war is undermined, Hamilton retorts:

> The answer to this is, that however true it may be,

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[76]Corwin, The President, pp. 178-179.

[77]Ibid., p. 179; Alexander Hamilton, The Papers of Alexander Hamilton, ed. Harold C. Syrett (New York: Columbia University Press, 1961--), 15 (1969):39.

[78]Hamilton, Papers, 15:39-40.

> that the right of the Legislature to declare war includes the right of judging whether the Nation be under obligations to make war or not--it will not follow that the Executive is in any case excluded from a similar right of Judgment, in the execution of its own functions.[79]

Hamilton develops this response with a hypothetical example. What if, he asks, there had been a treaty obligating the United States to fight alongside France in case that nation went to war? And what if a new government came to power in France with policies openly hostile toward Great Britain? Would not the President, if he extended recognition to that new government by virtue of his authority to "receive ambassadors," have placed the Legislature under an obligation to declare war?[80]

"Pacificus" continues as follows.

> This serves as an example of the right of the Executive, in certain cases, to determine the condition of the Nation, though it may consequentially affect the proper or improper exercise of the Power of the Legislature to declare war. The Executive indeed cannot control the exercise of that power--further than by the exercise of its general right of objecting to all acts of the Legislature; liable to being overruled by two thirds of both houses of Congress. The Legislature is free to perform its own duties according to its own sense of them--though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions. From the division of the Executive Power there results, in reference to it, a <u>concurrent</u> authority, in the distributed cases.[81]

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[79]Ibid., p. 40.

[80]Ibid., p. 41.

[81]Ibid., pp. 41-42.

In short, although the President cannot declare war, his foreign affairs powers, rooted in the Executive Power vested in him, enable the President to confront Congress with faits accomplis which the Congress may or may not support.[82] Thus, Hamilton concedes that Congress has the final word on war and peace.

> The legislature alone can interrupt those blessings /of peace/, by placing the Nation in a state of War.[83]

But he concedes no more to Congress than the final word.

> It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly--and ought to be extended no further than is essential to their execution.[84]

To sum up: it was Hamilton's view that only Congress can commence war, in the sense of authorizing protracted hostilities. However, the initiative in foreign affairs lies with the President and he may, as a result, create situations which lead to war.

Such claims for Presidential power did not sit well with the pro-French faction, led by Jefferson, who, on another occasion had expressed his understanding of war-making under the Constitution.

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[82]Corwin, The President, p. 180.

[83]Hamilton, Papers, 15:42.

[84]Ibid., p. 42.

> We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.[85]

Although Jefferson had approved of the Proclamation of neutrality he implored Madison to rebut "Pacificus."

> Nobody answers him and his doctrines are taken for confessed. For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in face of the public.[86]

Madison responded with his own series of articles signed "Helvidius," and published late in the summer of 1793. First off Madison rejects the

> extraordinary doctrine that the powers of making war and treaties are, in their nature, executive, and therefore comprehended in the general grant of executive power, where not especially and strictly excepted out of the grant.[87]

"Helvidius" contends that executive power can only be exercised where there is already law to be executed; that making a treaty or declaring war require no pre-existing laws; and that therefore such powers are more legislative than executive in nature.[88]

Furthermore, the Framers of the Constitution must have considered war-making a legislative power because they

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[85]Thomas Jefferson to James Madison, 6 September 1789, Portable Jefferson, p. 451.

[86]Quoted in Corwin, The President, p. 180.

[87]James Madison, "Helvidius" No. 1, Letters and other writings of James Madison, 4 vols. (Philadelphia: J. B. Lippincott & Co., 1865), 1:612-613.

[88]Ibid., pp. 614-615.

listed the power to declare war among the powers of Congress "without any other qualification than what is common to every other legislative act."[89]

Secondly, whatever the extent of executive power, it cannot extend to "authority clearly placed by the constitution in another department." "The declaring of war," Madison points out,

> is expressly made a legislative function. Whenever, then, a question occurs, whether war shall be declared, or whether public stipulations require it, the question necessarily belongs to the department to which those functions belong; and no other department can be in the execution of its proper functions if it should undertake to decide such a question.[90]

Thirdly, when "Pacificus" suggests that the right to judge whether or not the United States is obligated to go to war is concurrent (i.e., shared by both Congress and the President), he is inconsistent, imprudent and in error. He is inconsistent argues "Helvidius", because he had included the power of judging whether or not the United States is obligated to go to war within the power to declare war, which he admitted is vested in the legislature.[91]

He is imprudent because the branches might reach contradictory conclusions, thus embarrassing the United States before the world. Finally, argues "Helvidius,"

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[89]Ibid., p. 616.

[90]James Madison, "Helvidius" no. 2, ibid., p. 623.

[91]Ibid., p. 622.

"Pacificus" is in error because the notion of such a concurrent power finds no warrant in any of the provisions of the Constitution, and violates the principle of separation of powers.[92]

In summary, Madison tries to refute all of Hamilton's major contentions. He rejects Hamilton's claims for Presidential power in foreign affairs as encroachments upon Congressional war power.

> ...the legislature is the only competent and constitutional organ of the will of the nation, that is, of its disposition, its duty, and its interest, in relation to a commencement of war...
> In exercising the constitutional power of deciding a question of war, the legislature ought to be as free to decide, according to its own sense of the public good, on one side as on the other side.[93]

Presidential faits accomplis would rob the Congress of its power to freely decide for war or peace, and are therefore without constitutional warrant.

However, while Hamilton and Madison disagree about the extent of Presidential power over foreign policy, they agree upon a question of fundamental importance to our study. Both Hamilton and Madison agree that the last word on the commencement of war rests with Congress and not the President. That this is Madison's view cannot be doubted; the passage just quoted settles the issue.

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[92]"Helvidius" nos. 2,3, ibid., pp. 622-39.

[93]"Helvidius" no. 5, ibid., pp.648-649.

As for Hamilton, recall that it was "Pacificus" who remarked as follows.

> The legislature alone can interrupt those blessings /of peace/, by placing the Nation in a state of War.[94]

Thus, even the foremost proponent of Presidential power in foreign affairs of his day concedes that only Congress may place the United States "in a state of War." This is most significant and will weigh heavily in the conclusions we are about to draw.

Conclusions

1. Under British law and theory the war power was part of the Executive power, and resided in the Crown. Montesquieu and Locke considered the war power to be executive in nature. At the Constitutional Convention the President was initially granted all of the executive powers formerly invested in the Continental Congress, but this was objected to in part because it would have given the President the power of war and peace.

2. In Convention, the Committee of Detail vested the "executive power" in the President, while giving Congress the power to "make war." The full Convention changed the phraseology to "declare war," leaving certain war-powers to the President. While the full significance of the change is not clear, one effect was to empower the Presi-

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[94]Hamilton, Papers, 15:42.

dent to respond unilaterally in case of attack on the nation.

3. Post-Convention commentaries, such as the Federalist Papers, the record of the debates in the state ratifying conventions, and the "Helvidius-Pacificus" debate suggest that contemporaries believed that the Constitution gave Congress the final word on the commencement of war.

While there are a number of uncertainties, the original understanding of the Constitution seems to have been that Congress and Congress alone had the power to initiate war unless the country was attacked, or perhaps, in imminent danger of attack.

Perhaps "Helvidius" was right when he exclaimed:

> In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department.[95]

Nevertheless, "Pacificus'" message should not be forgotten; and it is that the Congress will have to take into account what the President has done in foreign affairs when it considers whether or not to commence war. For the President has a right, says "Pacificus,"

> in certain cases, to determine the condition of the Nation, though it may consequently affect the proper or improper exercise of the Power of the Legislature to declare war. The Executive indeed cannot control the exercise of that power...though the Executive in

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[95]James Madison, "Helvidius" no. 4, Letters, 1:643.

the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions.[96]

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[96]Hamilton, Papers, 15:41-42.

CHAPTER II

THE UNDECLARED NAVAL WAR WITH FRANCE, 1797-1800

Introduction

America's first undeclared war began in 1797, quite early in the nation's history. However, it was hardly an example of excessive claims on behalf of Presidential war power. On the contrary, Congress authorized nearly every hostile act undertaken in the Adams administration.

The roots of the so-called Quasi War lay in the war between France and England which began in 1793. The United States wished to maintain its profitable sea-trade with both of the great European powers, as well as with their Caribbean possessions. Naturally, both France and Great Britain resented any third party trading with the enemy. The newly independent United States, a military weakling with no navy or standing army, rapidly became a pawn in the great power struggle.[1]

Although the United States was bound by treaty to France[2] Washington proclaimed American neutrality in the European conflict in his famous Proclamation of April 22,

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[1]Thomas A. Bailey, A Diplomatic History of the American People, 9th ed. (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1974), pp. 66-91.

[2]United States, Department of State, Treaties and Other International Agreements of the United States, 1776-1949, comp. Charles I. Bevans (Washington: Government Printing Office, 1971), 7:763, "Treaty of Amity and Commerce," TS No. 83, 17 July 1778; "Treaty of Alliance," TS No. 82, 17 July 1778.

1793.[3] (This was the Proclamation that prompted the "Helvidius-Pacificus" debate.[4]) The Proclamation did little good, because immediately thereafter Great Britain seized American vessels and their crews carrying on a profitable food trade with France.[5]

Americans were not yet over their outrage at British depredations when France began to retaliate by seizing American merchant ships carrying supplies to England.[6] Early the following year, 1794, Britain eased its seizure policy and even offered indemnification for American losses. Consequently, the United States began negotiating with England, out of which issued the Jay Treaty.[7]

The Jay Treaty, ratified by Washington August 14, 1795, aroused great opposition from both France and her supporters in America, amongst whom most of the Jeffersonian Republicans could be numbered. The reasons for their anger are readily apparent: England had forced the United States to make concessions which were clearly unfavorable to France.[8]

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[3]James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents, 10 vols. (New York: Bureau of National Literature, Inc., 1897), 1:148-149.

[4]See my chap. 1, supra.

[5]Bailey, p. 73.

[6]Ibid., p. 74.

[7]U. S. Treaties and Other International Agreements, 12:13, "Treaty with Great Britain of Amity, Commerce and Navigation," TS No. 105, 28 October 1795; Bailey, pp. 74-82.

[8]Samuel F. Bemis, Jay's Treaty (New Haven: Yale University Press, 1962), pp. 365-68, 474-80.

In fact, a number of Jay Treaty provisions appear to be inconsistent with articles contained in the Franco-American Treaties of Alliance and of Amity and Commerce. For example, Article 24 of the Treaty of Amity and Commerce prohibited the neutral signatory (the United States) from granting port privileges to the privateers of any nation at war (England) with the other signatory (France).[9] But Article 25 of the Jay Treaty stipulated that British war ships and privateers were to have port privileges in the United States.[10]

In addition, by Article 17 of the Jay Treaty, the United States formally acquiesced in the British policy of disrupting sea trade with France. This clause permitted seizure of cargoes belonging to or destined for an enemy, the American merchant to be indemnified.[11]

By contrast, the Treaty of Amity and Commerce with France embodied a principle long urged by the Americans: "Free ships make free goods." This meant that the merchant ships of an ally were free to carry any goods, regardless of ownership, origin or destination, provided only that war material not be transported to an enemy.[12]

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[9] U.S. Treaties and Other International Agreements, 7:771.

[10] U.S. Treaties and Other International Agreements, 12:28-29.

[11] Ibid., pp. 25-26.

[12] U.S. Treaties and Other International Agreements, 7:771, art. 25.

The Quasi War

As noted above, French attacks on American shipping had begun in 1793, before the Jay Treaty. In early 1795 they subsided, but in the last months of Washington's administration, following proclamation of the Jay Treaty, depredations were renewed. On July 2, 1796, France decreed that, henceforth, she shall treat the vessels of neutrals "in the same manner as they shall suffer the English to treat them."[13]

Within one year of this proclamation, Secretary of State Pickering reported, France had seized 316 American vessels.[14] To make matters worse, Charles Cotesworth Pinckney, whom Washington had appointed as the new minister to France was rebuffed by the French Directory. And the President of the five-man Directory, Monsieur Barras, made a public address openly insulting the American government. Thus, by the time Adams took office, diplomatic relations with France had been severed.[15]

On March 2, 1797, two days before Adams' inauguration, France issued another decree, this one clearly aimed at American commerce. Enemy goods in neutral ships were

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[13]Gardner W. Allen, Our Naval War with France (1909; reprint ed., Hamdon, Conn.: Archon Books, 1967), pp. 30-31, 298.

[14]Bailey, p. 93.

[15]Allen, p. 22; Bailey, p. 93.

declared subject to seizure. Furthermore, any American serving on an enemy ship "shall be from that act alone declared a pirate and treated as such"; in other words, hanged, even if he had been forcibly impressed into the British navy. Finally, any American vessel not carrying a rôle d'equipage--a list of the crew prepared in a form deemed proper by French authorities--was to be considered good prize.[16]

On March 25th, Adams called for a special session of Congress to be convened May 15.[17] His goal was to get Congressional approval for new negotiations with France coupled with measures for national defense.[18]

Republicans were alarmed, fearing Adams was going to ask Congress for war measures against France. Many Federalists, on the other hand, were opposed to negotiations. Hamilton was not, as he secretly advised Adams' cabinet. As a result, Adams' address to the Special Session of the Fifth Congress, on May 16, 1797, accurately reflected Hamilton's views.[19]

Adams' message dealt only with France. He decried the rebuff of C.C. Pinckney and the speech of Monsieur

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[16]Allen, pp. 32-33, 298-299.

[17]Richardson, 1:222-223.

[18]Alexander De Conde, The Quasi-War (New York: Charles Scribner's Sons, 1966), p. 18.

[19]Ibid., pp. 18-25.

Barras as having "inflicted a wound in the American breast", but vowed, in the interest of peace, to "institute a fresh attempt at negotiation." At the same time, attacks on American vessels require, Adams told the Congress, some measures of defense. In the long run, a navy seems essential, he noted; for now, Congress should equip the three frigates begun during Washington's administration and not yet made sea-worthy, and provide smaller ships which, along with the frigates, could convoy unarmed merchantships. In addition, he urged Congress to augment the regular artillery and cavalry, revise the laws for the organization of the militia, and form a "provisional army."[20]

Not much was accomplished in that special session. The House spent the rest of May haggling over the formal response to the President's speech. (A formal reply was customary then.) On June 5, 1797, a series of resolutions establishing the principles (details were to be worked out by legislative committee) of Adams' defense program were offered. The Republicans opposed the program as being likely to lead to war with France; they urged delay until completion of the negotiations.[21]

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[20]Thomas H. Benton, Abridgment of the Debates of Congress (New York: D. Appleton, 1857), 2:114-17.

[21]U.S., Congress, Debates and Proceedings in the Congress of the United States, 1789-1824 (Washington: Gales and Seaton 1834-56), 7:239, 253ff. / Hereinafter cited as "Annals" /

Some debate on the war-powers of the President did take place. The Federalists wished to give Adams a relatively free hand in using whatever naval power Congress might authorize; the Republicans wished to constrain him. Federalist Congressman Otis offered a representative argument in response to a Republican amendment limiting the use of the navy to the jurisdiction of the United States.

> MR. OTIS sais he objected to the amendment, because it appeared repugnant to the powers placed in the President by the Constitution. If a naval force was raised, it would rest with the President how it should be employed, as he was commander-in-chief. The Legislature could say whether the vessels should be employed offensively or defensively, but to say at what precise place they were to be stationed, was interfering with the duty of commander-in-chief; and although he would have no right to send these vessels to the West Indies, or as convoys, yet he might defend the seaccast as he pleased.[22]

The amendment was defeated, 49-38. The Republican position was made clear during debate on a bill already approved in the Senate, providing a naval force for the protection of trade.

> MR. NICHOLAS . . . denied the right of the President to apply the naval force of the United States to any object he pleased. When a force was raised for a particular object, he agreed that it was his business to direct the manner in which this forces should be used; but to say he had the right to apply it at his discretion, was to make him master of the United States; if that were the case, he said, the powers of the House were gone. When they raised men for the protection of the frontier, would the President, he asked, send them to any other place? He insisted upon it that they had a right to say the vessels should be kept in the river Delaware, if they

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[22]Annals, 7:290.

> pleasd; the President might afterwards direct their conduct. If a contrary doctrine were to prevail, if they did not give up the right of declaring war, they gave up the power, which would inevitably lead to war.[23]

Congressman Harper, a Federalist from South Carolina, cleverly argued that the use of the navy ought to be left to the President because he had no authority to employ it in any but peaceful manner; to do otherwise "would be a breach of his power." "He, therefore, could not," Harper conceded, "repel any violation of our rights by force, except previously authorized by Congress."[24]

The Republicans were not convinced. Representative S. Smith pointed out that "{i}f the power of employing the frigates was wholly left with the President, though he had not the power of declaring war, yet he might so employ them as to lead to war."[25] Though the Republicans were outnumbered, they combined with moderate Federalists to force compromises and inaction.

As a result, the only legislation enacted that is pertinent to this study is as follows. Privateering by Americans against nations with which the United States is at peace or against other Americans was outlawed. Arms and ammunition exports were banned, and their importation en-

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[23]Annals, 7:362-363.

[24]Ibid., p. 364.

[25]Ibid.

couraged. Port and harbor defenses were improved. A detachment of militia was authorized: eighty thousand men to be called up from the various states. Taxes on vellum, parchment, paper, and on salt were established. And the act "providing a Naval Armament" was passed.[26]

The Naval Armament Act empowered the President, "should he deem it expedient, to cause the frigates United States, Constitution, and Constellation, to be manned and employed." This act also authorized the President to use the Treaury Department's revenue cutters "to defend the seacoast."[27] A frigate, incidentally, was a three-masted sail ship carrying between twenty-eight and forty-four guns on one or two decks. Cutters were much smaller vessels, carrying less than twenty guns. The British and other European navies were vastly superior, since they had whole squadrons consisting of ships-of-the-line, i.e., seventy-four gun ships.[28]

Perhaps the most important action of this first session of the Fifth Congress was the confirmation by the Senate of Adams' selections of the men to make up the new commission to France. Adams wanted a three-man commission of moderate views. His Cabinet, on the other hand, wanted

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[26]Annals, 9:3685-3701. 1 Stat. 520-23.

[27]1 Stat. 523-5 (1797).

[28]Harold H. Sprout and Margaret Sprout, The Rise of American Naval Power (Princeton, N.J.: Princeton University Press, 1939), p. 43.

three Federalists. Adams nominated C.C. Pinckney (still in Europe after his rejection by France), John Marshall, a Federalist lawyer and later Supreme Court Chief Justice, and Francis Dana, a Massachusetts judge. When Dana declined to serve, Adams replaced him--without consulting his Cabinet--with Elbridge Gerry, a moderate Republican. The Senate confirmed, and Marshall and Gerry left for France in late July, 1797.[29]

The commissioners were instructed as follows. They were to negotiate a new treaty with France designed to supersede all prior pacts; the new agreement was to last for ten or twenty years. The United States was to accept no blame for the current crisis, nor was it to agree to anything inconsistent with the Jay Treaty. Compensation for losses due to French depredations were to be sought, but were not to be considered indispensable to a treaty agreement. The United States could grant France the same privileges granted England in the Jay Treaty, including abandoning the "free ships, free goods" principle. Finally, the United States was to eliminate a clause in the Treaty of Alliance obligating it to guarantee French possessions in America; and the provision in a consular convention signed in 1788, calling for prize courts in American ports.[30]

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[29]De Conde, pp. 28-29, 35.

[30]Ibid., pp. 44-45.

The Americans would have to negotiate with France's new Minister of Foreign Relations, the wily Charles Maurice de Talleyrand-Périgord. Talleyrand was responsible to the five-man Executive Directory. He was instructed to abandon requiring American ships to carry a rôle d'equipage, but to delay indemnification for American losses. Furthermore, he was to end future depredations only if France were granted the same rights given England by the Jay Treaty.[31]

The envoys met Talleyrand in Paris in early October, 1797. He was polite, but refused to start negotiations. Later that month, Talleyrand's agents contacted the envoys informally, and requested as a prelude to negotiations a bribe for the French officials, a promise of an American loan to France, and a retraction of some of Adams' comments before the special session of Congress, last May 16th. (Soon thereafter, the Americans were shocked to learn that the bribe demand totaled about a quarter of a million dollars.) The commissioners were not morally outraged; they would pay the customary diplomatic douceur--but only after a treaty was agreed to, not as a preliminary to negotiations.[32]

As November drew near, Napoleon's triumph over Austria strengthened France's bargaining position with the

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[31]Ibid., p. 43.

[32]Ibid., pp. 46-47.

United States; her domination over Western Europe was assured. The rest of 1797 saw nothing but repeated demands for bribe money, coupled with repeated American refusals. The envoys also refused to agree to the loan because they felt it would violate American neutrality. Furthermore, they refused to disavow any of President Adams' speech. When the Fifth Congress opened its second session in mid-November, the legislators knew nothing of the diplomatic stalemate.[33]

On November 23, 1797, Adams urged the second session of the Fifth Congress, in light of "increasing depredations" by France, to approve of the "precautionary measures" he had recommended last May. But the Congress preferred to await news of the progress of the negotiations in Paris. On March 4, 1798, the administration received a number of dispatches, some in code, detailing the failure of the mission, the solicited bribes, and an account of a new French decree aimed at American commerce.[34]

Adams asked his cabinet if he should recommend a declaration of war to Congress. Secretary of State Pickering favored it, but Hamilton counseled Secretary of War McHenry to urge defensive measures. At first, feeling the United States had no choice, Adams drafted a war message; later he scrapped it, in part because he thought

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[33]Ibid., pp. 48-52.

[34]Annals, 7:631; De Conde, p. 66.

the Congress would not approve a declaration of war.[35]

On March 5, the President forwarded one of the uncoded dispatches to Congress, explaining that it was so important he wanted it to be "immediately made known." The dispatch stated "that there exists no hope . . . that the objects of our mission will be in any way accomplished." It also included details of the latest French decree. Adams reported receipt of other disptaches, yet to be deciphered.[36]

On January 18, the Directory had declared that a ship's cargo is no longer covered by its flag. In other words, goods once transported from an enemy (British) port are subject to seizure--even if on board a neutral (American) ship and owned by a citizen of a neutral state. This new decree was broadly enough interpreted to include items other than cargo--such as navigational instruments--which had been manufactured in England.[37]

On March 19, 1798, Adams sent a message to Congress, repeating his call for defensive measures to protect merchantships and "exposed portions" of United States territory. He told Congress that after examination and consideration of all the envoys' communications, "I perceive

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[35]De Conde, pp. 67-68.

[36]Annals, 7:1200-1202.

[37]De Conde, p. 53.

no ground of expectation that the objects of their mission can be accomplished on terms compatible with the safety, honor, or the essential interests of the nation." Furthermore, he rescinded an order of Washington's prohibiting the arming of American vessels.[38]

Congressional Republicans were alarmed; they feared that the Administration would lead them into war with France. Congressman Sprigg of Maryland proposed three resolutions, one of which declared "that under existing circumstances, it is not expedient for the United States to resort to war against the French Republic." This touched off a debate on the war-making power.[39]

Representative Sitgreaves opposed the resolutions; since Congress alone could declare war, he reasoned, simply forebearing "is a sufficient expression of their sentiment that such a declaration would be inexpedient." Representative Bladwin disagreed; we should, he suggested, turn to the Constitution for direction. Baldwin "did not believe it was intended that this House should merely be the instrument to give the sound of war; the subject seemed to be placed wholly in the hands of the Legislature. That," he went on,

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[38]Annals, 8:1271-1272.

[39]Ibid., p. 1319ff.

> was the understanding of the country when there was no Government in existence, and he believed this was the meaning of the Constitution . . . But . . . some persons declare that the present state of things is already a state of war; . . . if the House does not believe this to be a true position, this resolution ought to be agreed to . . .[40]

Mr. Otis, a Federalist, countered with a proposal to use "the Constitutional words" in the resolution, substituting "declare" for "resort to." Representative Nicholas rose to protest that in its original wording "the mischief was met, whilst the other meant nothing." He explained that

> if gentlemen were ready to say we were not prepared to declare war, and at the same time were not ready to say it is not expedient to resort to war, it proved that they thought war might be made without being declared.[41]

Then Nicholas spoke to the heart of Republican fears. Has not the Executive, he asked rhetorically, taken measures which would lead to war, leaving Congress with no choice on the matter? He was certain the Constitution gave Congress

> the power over the progress of what led to war, as well as the power of declaring war; but if the President could take the measures which he had taken, with respect to arming merchant vessels, he, and not Congress, had the power of making war.[42]

The Sprigg resolutions died; but they were quickly overshadowed by the effects of a new, and successful, Republican-supported resolution. This measure, offered by

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[40] Ibid., pp. 1320-1321.

[41] Ibid., pp. 1321-24.

[42] Ibid.

extreme Federalists to embarras France and her American sympathizers, called for the President to release all the dispatches referred to in his March 19th message to Congress. The extreme Federalists, unlike the Republicans, were apparently aware in advance of the explosive nature of the dispatches. The House resolution passed on April 2, 1798.[43]

Adams hastily complied the very next day. He forwarded the envoys' instructions along with their decoded dispatches, using the initials, W, X, Y, and Z in place of the names of Talleyrand's bribe-demanding agents. The Republicans were stunned, the Federalists emboldened. Soon, newspapers published or reported about the "XYZ dispatches", and Congress had copies printed for distribution. Thereafter, Congress and the public turned against France.[44]

In the meantime, the mission to France broke up. Talleyrand, desirous of negotiating with the envoy most sympathetic to France--Mr. Gerry--successfully alienated Marshall and Pinckney by repeatedly demanding an American loan. In addition, he flattered Gerry into believing he was the last hope for a Franco-American rapprochement. So in the Spring of 1798, Marshall sailed for America, to be treated like a hero, Pinckney remained with his family in

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[43]De Conde, pp. 71-72.

[44]Ibid., pp. 72-75.

southern France, and Gerry, although without authority to negotiate a treaty on his own, remained in Paris.[45]

The Envoys did not know it, but their dispatches would be used to whip up an anti-French frenzy in America. The Federalists promoted the hysteria in order to obtain support for their war program, and, not incidentally, to discredit and destroy the Republican party.

Throughout the Spring and Summer of 1798, the Congress continued to debate various war measures proposed by the Federalists. As is often the case with legislatures, the immediate issue was sometimes masked by discussions of abstract principles of constitutional and international law. Debates turning on the question of the war-making power are of particular interest.

On April 18, the House took up a bill already passed by the Senate, which authorized the President to procure up to sixteen vessels rated at no more than twenty-two guns, to be employed as convoys or however the President thought proper. Representative Harper, a Federalist, supported the measure on the grounds that once the ships were provided the President has the Constitutional authority to employ them as he pleases "conformably to the state of peace." It is the business of the Congress, Harper argued, "to fi[illegible] the state of the country, and provide

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[45]Ibid., pp. 53-58, 92-93.

force; that of the President to employ the force, according to that state."[46]

The next day, Congressman Dayton, Federalist, supported Harper's argument, noting that the President derived his authority from the Constitutional provision making him Commander-in-Chief of the Army and Navy. Mr. Gallatin, Republican, disagreed. There is a difference, he declared, between the power to command, which the President has, and the "application of a force," which is a legislative function. "Besides," he added,

> if this power of granting convoys in the President be taken for granted . . . a distinction must be assumed which is not recognized in the Constitution, viz: between the power of making war, and the power of committing hostility. Because it necessarily results from the power of granting convoys, that the President also has the power of authorizing the commision of hostilities. Convoys are granted for the protection, by force, of our trade, and any attack is hostility; and until the distinction . . . was assumed, it was impossible to allow that the President had any such power.[47]

Representative Dana, Federalist, took issue with Gallatin's assertion that authorizing convoys will produce war. He suggested that convoys are measures of defense, and, citing Vattel, added that "defense is not hostility; nor do mere reprisals amount to war." Gallatin retorted that Dana was making mere verbal and legal distinctions, that convoys would likely mean fighting, and there is "no

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[46]Annals, 8:1445-1446.

[47]Ibid., p. 1456.

difference in fact between fighting and war."[48] Ultimately, the Republicans managed to delete any reference to convoys, and to reduce to twelve the number of ships to be procured. But a Republican measure to prohibit convoying was defeated.[49]

In May and June, under great pressure from extreme Federalists and fearing for the safety of his envoys who had yet to return from France, Adams again considered asking for a declaration of war. Not all Federalists agreed, however.[50] Hamilton, for one, felt that Adams should put the onus on Congress by declaring that his authority went only "so far and no farther," but that our trade required "a more extensive protection." Hamilton went on, in the same letter to Secretary of War McHenry, May 17, 1789, to describe the limits of Presidential authority as follows.

> Not having seen the law which provides the Naval Armament, I cannot tell whether it gives any new power to the President that is any power whatever with regard to the employment of the Ships. If not, and he is left at the foot of the Constitution, as I understand to be the case, I am not ready to say that he has any other power than merely to employ the Ships as Convoys with authority to repel force by force (but not to capture), and to repress hostilities within our waters including a marine league from our coasts--
> Anything beyond this must fall under the idea of reprisals & requires the sanction of that Department

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[48] Ibid., pp. 1503-1504, 1510-1511.

[49] Marshall Smelser, The Congress Founds the Navy, 1787-1798 (Notre Dame, Ind.: University of Notre Dame Press, 1959), pp. 145-146; Act to provide an additional Armament, 1 Stat. 552 (1798).

[50] De Conde, p. 89.

> which is to declare or make war.
> In so delicate a case, in one which involves so important a consequence as that of War--my opinion is that no doubtful authority ought to be exercised by the President.[51]

Adams never did ask for a declaration of war, and Congress continued to pass war legislation.

A Senate bill authorizing the President to raise a "provisional army" also roused strong Republican opposition, and some debate on Presidential power. The Republicans argued that the Constitution empowered the Legislature alone to raise an army, but this bill turned that power over to the President. Gallatin warned: {I}f Congress were once to admit the principle that they have a right to vest in the President powers placed in their hands by the Constitution, that instrument would become a piece of blank paper."[52]

The Federalists responded that the bill was not intended to transfer any Congressional powers, that the Provisional Army would be raised by the Legislature, and that the President could act only in the event of certain contingencies, viz., a declaration of war against the United States, an invasion, or, imminent danger of invasion. Republicans thought the last contingency too vague, but on May 11 the bill passed the House. The Republicans were

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[51]United States, Office of Naval Records and Library, Naval Documents relating to the Quasi War with France, 7 vols. (Washington: Government Printing Office, 1935-38) I (1935): 75.

[52]Annals, 8:1526.

able to reduce the size of the force from the twenty thousand approved by the Senate, to ten thousand.[53]

As public indignation over the XYZ dispatches mounted, so did the aggressiveness of the Federalist war program. On May 22, Representative Sitgreaves introduced a series of resolutions instructing private armed vessels to "take or destroy" any French cruiser attacking an American ship, and to retake any American craft so captured. Also, public armed ships would be ordered to "take or destroy" French cruisers found within blank miles of the American coast. The Republicans angrily opposed the measures as being tantamount to war. "It is true," Gallatin fumed,

> they are not a declaration of war; but they go to the making of partial war. Was it ever heard that letters of marque were given to public vessels? /These resolutions/ are instructions to our public vessels to make war.[54]

The Sitgreaves resolutions were abandoned however, because the Senate had already completed and forwarded to the House a bill designed to do the same thing: clear the coast of French cruisers. On May 28, 1798, "An Act more effectually to protect the commerce and coasts of the U.S." was approved by Congress. By this act the President was authorized to instruct the navy to "seize, take and bring into port" armed vessels that have committed depredations

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[53]Ibid., 1641-89.

[54]Ibid., 1783, 1809.

or are found "hovering" on the American coast for that purpose.[55] Thus, Adams became the first Chief Executive to preside over a limited, but undeclared war.

John Marshall arrived in America in mid-June, 1798. He was feted, and a toast at one of the parties in his honor became a patriotic Federalist rallying cry: "Millions for defense, but not a cent for tribute." It referred, of course, to the refusal of the commissioners to meet the bribe and loan demands of Messieurs W,X,Y,and Z. Marshall then advised Adams that, in his opinion, the French Directory did not want full-scale war with the United States. Adams, who had be now been caught up in the war hysteria himself, postponed his decision to ask Congress for a declaration of war.[56]

Adams instead sent a special message to Congress on June 21, announcing the end of the mission to France, his pleasure at Marshall's safe return, and his refusal to send any more ministers to France unless assurances of their proper and respectful treatment were given.[57] The extreme Federalists were disappointed; they were hoping that Adams would ask for a declaration of war. On July 5, Congressman Allen, Federalist, offered a resolution to establish a

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[55]1 Stat. 561; Annals, 9:3733; Smelser, pp. 165-166.

[56]De Conde, pp. 92-95.

[57]Richardson, 1:256.

committee to declare the state of relations between the United States and France. But the moderate Federalists and Republicans killed the measure. They also defeated extreme Federalist attempts to make unarmed French ships legitimate subjects of attack; such measures would have altered America's defensive posture.[58]

As it was, the tumultuous second session of the Fifth Congress enacted over a score of bills related to the Quasi War. The principal legislation established a separate Navy Department,[59] authorized procurement of twelve twenty-two-gun ships,[60] and ten smaller vessels (gallies),[61] permitted the President to accept an additional twelve ships as gifts or loans in exchange for six percent bonds,[62] empowered the President to raise a Provisional Army[63] and enlarge the regular military,[64] authorized the seizure of French armed ships,[65] fortified ports and harbors,[66] pro-

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[58]Ibid., pp. 95, 103-106.

[59]1 Stat. 553 (1798).

[60]Ibid., p. 552.

[61]Ibid., p. 556.

[62]Ibid., p. 575.

[63]Ibid., p. 558.

[64]Ibid., p. 604.

[65]Ibid., p. 561.

[66]Ibid., p. 554.

vided arms and ammunition,[67] established a Marine Corps,[68] suspended trade with France and her dependencies,[69] and abrogated all treaties with France.[70] In addition, it adopted the notorious Alien and Sedition Acts, aimed at repressing opponents of Federalist policies.[71]

Of the legislation produced in the second session, the following are pertinent to the war-making power of the President. An act providing "an additional regiment of artillerists and engineers" empowered the President to employ same "in the field, or the fortifications upon the seacoast, as, in his opinion, the public service shall require."[72]

The Provisional Army Act authorized the President to enlist up to ten thousand men "in the event of a declaration of war against the United States, or of actual invasion . . . or of imminent danger of such invasion discovered, in his opinion, to exist, before the next session of Congress."[73]

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[67] Ibid., p. 555.

[68] Ibid., p. 594.

[69] Ibid., p. 565.

[70] Ibid., p. 578.

[71] Ibid., pp. 566, 570, 577, 596.

[72] Ibid., pp. 552-553.

[73] Ibid., p. 558.

The law "more effectually to protect the commerce and coasts of the United States" pointed out that French cruisers had "committed depredations" against American merchant ships in violation of Franco-American treaty agreements. Therefore, the President was authorized to order the navy to "seize, take, and bring into . . . port . . . armed vessel{s} which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations" against American vessels; and to retake any American ship so captured.[74]

This last piece of legislation, enacted late May, was supplemented in July by the "Act further to protect the commerce of the United States." The latter empowered the President to instruct the navy to "subdue, seize, and take any French armed vessel, which shall be found within the jurisdictional limits of the United States or elsewhere, on the high seas."[75] Section two enabled the President to grant "special commissions" to private armed vessels to act in similar fashion.[76]

Finally, in mid-July, "An Act to augment the Army of the United States, and for other purposes," was approved,[77]

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[74]Ibid., p. 561.

[75]Ibid., p. 578.

[76]Ibid., p. 579.

[77]Ibid., p. 604.

Section two authorizes the President to enlist twelve infantry regiments and six troops of "light dragoons" (mounted troops), "for and during the continuance of the existing differences between the United States and the French Republic."[78]

The two acts to protect commerce are the most important in authorizing the hostilities of the war. The war has been called a "quasi war," and these acts are said to be "half-measures," in part, because the United States never formally declared war against France. But they are "half-measures" in another sense as well, as evidenced by the limited nature of the hostilities they permit. In both the May Act and its July supplement, attacks are permitted on French armed vessels only. This omits unarmed, French merchant vessels, which would be normal subjects for attack in a war.[79]

Secondly, although preparations for a ground war are the objects of the Provisional Army and Army augmentation legislation, no provision is made for the use of these troops in hostilities. Actually, the Provisional Army was never recruited, and in early 1800, Congress effectively revoked these measures.[80]

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[78]Ibid.

[79]De Conde, p. 96.

[80]Ibid., pp. 255-256.

Third, not only are naval hostilities alone permitted, but these are limited in locale as well as subject. Even the "Act further to protect commerce" excludes attacks on French ships in their own territorial waters. Incidentally, this raises some question about the legitimacy of American naval operations off the coasts of French possessions in the West Indies (discussed below).

Under the July Commerce Act over a thousand "special commissions" were issued to American private armed ships. But because they could not attack any but armed French vessels, unarmed merchant ships being proscribed, there was not enough private profit incentive for real American privateering. This was especially true since the British navy had practically cleared the seas of French merchant ships.[81]

By the Fall of 1798, the infant United States Navy and American armed merchantships had discouraged French corsairs from operating off the American coast. Operations were then expanded to the Caribbean, where French privateers had been feasting off burgeoning United States trade. The American Navy operated out of St. Domingue (Haiti), where we had major sugar interests, and Guadeloupe. Both were French possessions, although French rule in St. Domingue was only nominal after Francois Dominique Toussaint

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[81]Ibid., p. 127.

(L'Ouverture) led a black slave revolt there.[82]

The French cruisers had been based off these islands, so the principal action of the war took place there. By the beginning of 1799, the United States Navy was successfully convoying a resurgent American commerce in the West Indies. On March 14, 1799, the French governor-general of Guadeloupe declared war on the United States, and formally ordered the seizure of American ships. But this had no effect on the war because the United States Navy had, by then, restrained French privateers in the Caribbean.[83]

Even before the Navy curtailed their privateers, France had resolved to avoid a complete rupture with the United States. Several factors contributed to the French decision. On August 1, 1798, Admiral Nelson destroyed the French fleet in Aboukir Bay, Egypt. France needed supplies which could be shipped in American bottoms, and did not want to lose the revenue from trade with the United States. Furthermore, an expansion of the war would jeopardize Republican chances in the next American Presidential elections, and might even have led to an Anglo-American alliance to wrest French possessions in America. Finally, the XYZ affair created a scandal in France, causing Talleyrand to disavow his own agents. From that point

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[82]Ibid., pp. 126-128; Allen, pp. 34-35.

[83]De Conde, pp. 128-30.

on, Talleyrand sought peace.[84]

The French Minister of Foreign Relations proceeded to contact William Vans Murray, United States Minister to the Batavian Republic (Netherlands), and through him forwarded a conciliatory message to Adams. But the same day the letter was sent--July 9, 1798--the Directory ordered an embargo on American ships in French ports. On July 31, after an appeal from Talleyrand, the Directors reversed themselves, and in addition, revoked the commissions of their West Indies privateers, recalled corrupt prize court judges, repealed the requirement of the rôle d'equipage, and called for neutral and allied vessels to be respected.[85]

On December 8, 1798, Adams addressed the Fifth Congress at the opening of its third session. He announced that France "appears solicitous to impress the opinion that it is averse to the rupture with this country," but that nothing in its conduct ought cause us to relax defensive measures. If appropriate assurances were to be given that he would be received, Adams would send another minister to France. And, if France agrees to "make reparation" for American commercial damages, and to "desist from hostility", "friendly intercourse" can be restored. Finally, Adams recommended that the Navy be increased.[86]

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[84]Ibid., pp. 140, 144, 161.

[85]Ibid., pp. 147, 151, 153.

[86]Annals, 9:2420-24.

During that session, Congress enacted legislation to augment the Army, Navy and Marines, and provided relief for American seamen. It authorized the President to retaliate against captured Frenchmen for the harsh treatment afforded captured Americans impressed into the British navy. It outlawed diplomacy by private citizens, such as that attempted by the idealistic Quaker, Dr. George Logan. Finally, it further suspended trade with France and her dependencies, while allowing the President to make exceptions. (The last-mentioned clause was added to enable the United States and Toussaint L'Ouverture to work out an agreement of mutual interest.")[87]

After receiving word of additional conciliatory gestures by Talleyrand in a dispatch from William Vans Murray, Adams decided to seek peace. He nominated Murray to be the new Minister Plenipotentiary to France, but then expanded the mission to three, adding Supreme Court Chief Justice Oliver Ellsworth and Patrick Henry. Henry declined because of advancing age, and was replaced by William Richardson Davie, a Federalist governor of North Carolina. Despite extreme Federalist opposition to any new peace initiative, the Senate confirmed, late February, 1799. A few days later, the Fifth Congress adjourned.[88]

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[87]Ibid., pp. 3795-3693; De Conde, p. 136.

[88]De Conde, pp. 174-85.

Negotiations were delayed because of the instability of the French government: the Directors were purged in the Summer of 1799, and on November 9 (18 Brumaire) of that year, Napoleon overthrew the Directory and replaced it with a Consulate of three. That same month, the new American commission to France sailed to Europe. Napoleon, the First Consul, was virtual dictator of France, and Talleyrand, who had been forced out in the Summer purge, was reinstated as Minister of Foreign Relations.[89]

Despite desires for peace on both sides, the naval war continued. In fact, the United States Navy captured more French armed vessels in 1800 than in any other year of the war. In addition, the Adams administration sought to undermine French influence in Santo Domingo by aiding Toussaint L'Ouverture. The Navy first blockaded, then bombarded the port of Jacmel, controlled by Toussaint's rival. Having assured the rival's defeat, the United States then reopened trade with those parts of the island under Toussaint's control.[90]

As a prelude to negotiations, in December, 1799, Napoleon nullified all the remaining anti-neutral decrees of the Directory. Negotiations began April 2, 1800. They stalled however, over the status of the Franco-American

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[89]Ibid., pp. 214-25.

[90]Ibid., pp. 210-211.

Treaties of 1778 and the Consular Convention of 1788, as well as the question of indemnities. (The Congress had nullified the Treaties, but France would not recognize the validity of the abrogation unless the United States dropped indemnification claims.)

The Americans broke the deadlock by offering to negotiate an end to the current hostilities while postponing indefinately the treaties and indemnities questions. Napoleon liked the idea and a treaty known as the Convention of Mortefontaine was completed in September, 1800.[91]

1800 was a Presidential election year in the United States, and the Federalist party entered it badly split. The breach between the Hamiltonians and Adams had widened beyond repair. Early in the year the President dismissed his Secretaries of War and State (McHenry and Pickering), and replaced them with more moderate Federalists. In the Spring, the Federalists caucused and selected Adams and Charles Cotesworth Pinckney to be their Presidential and Vice-Presidential standard-bearers, respectively. But the Hamiltonians were secretly hoping that Pinckney would receive more electoral votes than Adams.[92]

Adams heard little from the negotiators. He feared

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[91]Ibid., pp. 231-55; U.S. Treaties and Other International Agreements, 7:801, TS No. 85, 31 July 1801.

[92]De Conde, pp. 270-72.

France might stall until after the elections, in the hope of a Republican victory. As a result, he again considered asking Congress for a declaration of full-scale war, but was dissuaded by his new Secretary of State, John Marshall. When the Presidential electors were chosen on October 14, word of the Convention of Môrtefontaine had not yet reached the United States. In November, news of the agreement was published in American newspapers; but on December 3, 1800, the electors denied the Federalists control of the Executive branch.[93]

On December 11, 1800, the day before Adams learned of his defeat, Governor Davie, one of the negotiators, arrived in the United States with the official text of the Convention. Article 1 declared "a firm, inviolable, and universal peace, and a true and sincere Friendship" between the signatories. The second article confessed the inability of the parties "to agree at present" on the status of the Franco-American Treaties or on indemnity claims, and called for further negotiations "at a convenient time." Meanwhile, Article 2 stipulated, the Treaties "shall have no operation," and relations between the countries are to be governed by the Convention.[94]

Other provisions concerned commerce (to be on a most

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[93]Ibid., pp. 280-85.

[94]Ibid., pp. 288, 352-353; U.S. Treaties and Other International Agreements, 7:802.

favored nation basis), and neutral rights (no rôles d'equipage required, free ships make free goods--except for an explicit, narrow list of contraband, and stricter stop-and-search procedures).[95]

On December 15, 1800, Adams submitted the Convention to the Senate with a recommendation for consent.[96] Moderate Federalists and Republicans generally approved; the more extreme Federalists were opposed. As a result, the Senate at first failed to give the necessary two-thirds approval. Upon resubmission, the Senate reversed itself with the reservation that Article 2 (respecting the Treaties and indemnities) be expunged, and that an eight-year expiration date be added to the pact.

Adams reluctantly agreed with the Senate's modifications, and recalled American warships from the West Indies. Talleyrand, meanwhile, called upon French prize courts to adopt the "free ships, free goods" principle, and asked the Minister of Navy and Colonies to curb privateers. Adams left the exchange of ratifications to his successor, but the Quasi War with France was now over.[97]

France refused to exchange ratifications with the Jefferson administration because of the Senate's provisions.

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[95]De Conde, pp. 254, 353-70; U.S. Treaties and Other International Agreements, 7:801-11.

[96]Richardson, 1:303.

[97]De Conde, pp. 288-95.

She wished neither to pay indemnities, nor to agree to the abrogation of the Treaties. She offered to accept the Convention with the reservations only if the United States dropped indemnification claims altogether. The Jefferson administration agreed, and ratifications were exchanged on July 31, 1801.[98]

The Quasi War and the President's War Powers

When John Adams ordered naval operations against France, he acted with express authorization from Congress. Furthermore, his orders did not exceed the boundaries of the authorization, except perhaps for the naval operations in the territorial waters of France's possessions in the Caribbean. Postponing for the moment discussion of the operations off the French West Indies, let us examine the war powers granted President Adams.

Since the Quasi War was a naval war, the most pertinent acts were the two designed to "protect commerce" by the use of private and public armed vessels.[99] Under the May 28, 1798 Act, the President was empowered to order the Navy to seize French armed vessels "which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depreda-

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[98]U.S. Treaties and Other International Agreements, 7:801, and notes 1, 2.

[99]See notes 74-78 and accompanying text, supra.

tions on" American ships.[100]

The Act of July 9, 1798 authorized the President to instruct the Navy and commanders of specially commissioned private armed vessels to seize any armed French ship found either within the jurisdictional limits of the United States or on the high seas.[101]

By these Acts, especially the July legislation, the Congress authorized limited warfare against France. Accordingly, President Adams could and did order American vessels to attack armed French ships in the United States territorial waters or anywhere on the high seas. As has been noted, above, the Congress did not authorize land operations against France, attacks on unarmed French vessels, including merchant ships, or naval operations within the territorial waters of France and her possessions. Their limitations notwithstanding, these Acts mark the first time in American history that a President was authorized to conduct warfare without a declaration of war by Congress.

This undeclared war did not, however, result in a growth in Presidential power, because the President acted almost exclusively within the bounds of prior legislative prescription. It may in fact be argued that the Quasi War establishes a precedent for some kind of prior legislative

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[100] 1 Stat. 578.

[101] Ibid., p. 604.

approval before the President orders the conduct of hostilities without a declaration of war.[102] On the other hand, we may note that the Constitution is by no means unambiguous regarding the power of Congress to authorize hostilities without a declaration of war. Article 1, Section 8, Paragraph 11 of the Constitution gives Congress the power to "declare War, {and} grant Letters of Marque and Reprisal."

The Constitution does not discuss explicitly hostilities without a declaration of war. Some have taken the "letters of marque and reprisal" clause to establish by implication Congressional authority in this area.[103] However, the meaning of the phrase is unclear, since the practice of issuing such letters was obsolete when the Constitution was written, and the Framers never commented on the clause. The private vessels commissioned under the July 9, 1798, Act are said to be "letters of marque" or privateers, but the Constitutional phraseology was never used in the legislation.[104]

The uncertainty of the Constitution regarding hosti-

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[102]See, e.g., Merlo Pusey, The Way We Go To War (Boston: Houghton Mifflin Co., 1969), pp. 49-53; Arthur M. Schlesinger, Jr., The Imperial Presidency (Boston: Houghton Mifflin Co., 1973), pp. 21-221

[103]See, e.g., Schlesinger, p. 21.

[104]Grob, pp. 238-239. The President was authorized to grant "special commissions." 1 Stat. 570 (1798).

lities without a declaration of war was exploited by both proponents and opponents of the Quasi War with France. Albert Gallatin opposed the section of a bill that empowered the President to convoy merchantships on the grounds that convoying meant hostilities, and therefore, in order for the President to have such a power, "a distinction must be assumed which is not recognized in the Constitution, viz: between the power of making war, and the power of committing hostility."[105]

The Federalists responded that the President, as Commander-in-Chief, could use whatever military or naval force Congress provided as he thought best, provided he do so in conformity with the "state" (i.e., state of war or of peace) in which Congress places the nation.[106]

Alexander Hamilton's views on the question, at that time, are most interesting, especially in light of his previously published broad interpretation of Presidential war-power. (Hamilton adopted a broad construction in a series of articles under the pseudonymn "Pacificus." James Madison, writing as "Helvidius," defended a narrower interpretation.) In his May, 1798 letter to Secretary of War McHenry, Hamilton argued that the President could only undertake what amounted to defensive measures when acting

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[105]See note 47 and accompanying text, supra.

[106]See note 48 and accompanying text, supra.

on his own, i.e., without Congressional approval.

Specifically, Hamilton reasoned, convoying was permissible, provided that attacking ships were merely repelled and not captured. Furthermore, hostilities in American territorial waters could be repressed under color of presidential authority. But anything beyond this, Hamilton cautioned, requires legislative sanction.[107]

From the positions of Gallatin, the Congressional Federalists, and Hamilton we may distill three contrasting views of the power of the President to conduct hostilities without legislative approval. Gallatin's is the narrowest interpretation, for if the Constitution does not distinguish between war and hostilities, and the power to make war is legislative, then the executive has no authority to order hostilities unilaterally. The second position, that of the Congressional Federalists, is the broadest: the only restriction on the President's use of the navy is that he must not place the country in a state of war without Congressional sanction. Under this view, the President may order hostilities short of war without Congressional approval. Hamilton's view falls somewhere in between; he seems to feel that the President may undertake purely de-

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[107] See text accompanying note 51, supra. Later, Hamilton, writing as "Lucius Crassus," did a complete about-face and scorned President Jefferson for adopting the very position Hamilton himself espoused in the McHenry letter. See my chap. 3, infra.

fensive measures on his own, but that he requires Congressional approval for anything beyond them.

As it turned out, President Adams, with one possible exception, did nothing without prior authorization by the Congress. Thus it was established as practice that without a declaration of war, but with the appropriate enabling legislation, the President may order American vessels to attack and seize the armed vessels of another nation.

The possible exception to Adams' strict adherence to the language of Congressional war-measures came during the naval operations in the West Indies. The July 9, 1798 Act further to protect commerce authorized American ships to seize any French armed vessel "within the jurisdictional limits of the United States, or elsewhere, on the high seas." While it is not apparent that Congress considered the coastal waters of the United States to be part of the "jurisdictional limits," the idea that states had a maritime boundary, the "marine league", would seem to have been well established at the time of the Quasi War.[108]

Since American naval operations off the shores of French possessions in the Caribbean did not take place, strictly speaking, on the high seas, they may well have exceeded the directions of the Legislature. A clearer viola-

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[108]Charles G. Fenwick, International Law, 4th ed., (New York: Appleton-Century-Crofts, 1965), p. 443.

tion was the American intervention in the civil war in St. Domingue. In early 1800, United States naval vessels first blockaded, then bombarded, the port of Jacmel, St. Domingue, in order to defeat Toussaint L'Ouverture's rival.[109]

The authority to bombard a port for strategic (or economic) advantage, not having been granted by Congress, was simply assumed by the President. These operations clearly exceeded the terms of Congressional authorization. By contrast, whatever naval operations took place within the maritime boundary of Guadeloupe after March 14, 1799 would seem to be justified by the declaration of war against the United States issued by the island's governor on that date.

Out of claims of salvage rights for captured ships and damages suffered by merchants arose some court cases of interest. The first of such cases, Bas v. Tingy,[110] was decided by the Supreme Court in February, 1800, while hostilities were being conducted. Captain Tingy's claim for one-half allowance for an American ship he recaptured from a French privateer was challenged on the ground that the 1799 law granting such an allowance for ships and goods "'retaken from the enemy'" was not applicable to France.

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[109]See text accompanying note 90, supra.

[110]4 Dall. (U.S.) 37; 1 L. Ed. 731 (1800).

France, the plaintiff reasoned, was not an "enemy" within the meaning of the Act because it and the United States were not really at war.[111]

Thus the case turned on whether or not the United States and France were at war despite the lack of a formal declaration. Four Supreme Court justices opined, seriatim, that war indeed existed, although a limited or "imperfect" war. Justice Chase noted that "Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time." He went on to describe the limitations adopted by Congress in the Franco-American conflict. "There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels, lying in a French port . . ."[112]

Chase, like his fellow justices, assumed that Congress has the authority to initiate hostilities without a declaration of war. His dictum that armed French vessels in a French port were not legitimate objects of capture supports our contention that American naval operations within the maritime boundaries of the French West Indies exceeded Congressional guidelines.

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[111]John B. Moore, A Digest of International Law, 8 vols. (1906; reprint ed., New York: AMS Press, 1970), 7; 156.

[112]1 L. Ed. 731, 734.

A year and a half after Tingy received his favorable judgment, the Supreme Court reviewed the merits of another salvage claim in Talbot v. Seeman.[113] Captain Talbot of the "U.S.S. Constitution" claimed salvage rights on a ship originally owned by a Hamburg merchant, seized by France, and recaptured by the plaintiff. In August, 1801, Chief Justice John Marshall wrote a decision in Talbot's favor.

The legitimacy of Talbot's action, Marshall noted, depends upon the state of Franco-American relations at the time of the recapture. To determine this, the jurist continued in a revealing bit of dictum, one must examine the relevant acts of Congress. To use Marshall's own words,

> /_t_/he whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities,...or partial hostilities...[114]

After reviewing the legislation in question, the Court found the United States to have been in a "limited state of hostilities."[115] Furthermore, since Congress intended that French armed vessels be captured, and Talbot's prize appeared to be just such a vessel, the recapture was lawful.

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[113] 1 Cr. (U.S.) 1; 2 L. Ed. 15 (1801).

[114] 2 L. Ed. 15, 24.

[115] Ibid., p. 25.

Those claiming losses due to French depredations against their merchantships did not fare as well, however. France had obtained United States renunciation of indemnity claims against her upon the exchange of ratifications of the Convention of Môrtefontaine.[116] Throughout the nineteenth century, the United States government continually refused to accept any liability on its part for the damages. Bills for relief were twice vetoed, by Presidents Polk (1846) and Pierce (1855), respectively. Finally, in 1885, Congress authorized the Court of Claims to take up what had come to be known as the "French Spoliation Cases."[117]

The Court of Claims was prohibited from awarding judgments, but it could offer an advisory opinion regarding the liability of the Federal government. In Gray v. United States,[118] the Court of Claims, relying principally upon the instructions to the commissioners who negotiated the Convention of Môrtefontaine, held that the hostilities with France had not placed the United States in a state of war. Bas v. Tingy, which held to the contrary, was decided before the instructions were prepared, the Court noted.

Since no war existed, damage claims for property losses were valid; and since the United States government

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[116]See note 98 and accompanying text, supra.

[117]Moore, Digest, 6:1022-25.

[118]21 Ct. Cl. 340 (1886).

let France out of its obligations for diplomatic considerations, it should make good the losses. Despite the Gray decision, French spoliation claims dragged on well into the twentieth century.[119]

Finally, we consider the case of Little v. Barreme, in which the United States Supreme Court upheld the authority of Congress to restrict the Commander-in-Chief.[120]

It seems that by Act of Congress, American vessels, including those disguised as ships of another nation were subject to seizure if found sailing toward a French port.[121] As a consequence, one Captain Little seized and brought to port a vessel, the "Flying Fish," which he believed to be American-owned.

Unfortunately for Little, the ship was owned by Danes, and furthermore, was returning <u>from</u> a French port rather than headed toward one. In the ensuing litigation, Chief Justice John Marshall spoke for the Supreme Court in finding that Little had exceeded the law, and that even Presidential commands to the contrary would be unavailing. Marshall wrote as follows.

> It is by no means clear that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special auth-

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[119] Grob, p. 55.

[120] 2 Cr. (U.S.) 169, 8 L. Ed. 243 (1804).

[121] 1 Stat. 613 (1799).

> ority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.[122]

With these words, Marshall voiced tentative approval of Presidential authority to seize the property of United States citizens in war-time--even in the absence of an act of Congress. However, he concluded as follows.

> . . . the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude seizure of any vessels not bound to a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her had she really been American.[123]

The sum and substance of the Little ruling is that the Congress may regulate the conduct of hostilities if it so desires, any orders of the Commander-in-Chief to the contrary notwithstanding. Had such a rule been applied to the bombardment of the port of Jacmel, St. Dominique,[124] there could be no doubt of the outcome.

Thus, in terms of legislative, executive and judicial pronouncements on the subject, the Quasi War with France is a clear victory for Congressional power over the commencement and conduct of war.

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[122] 8 L. Ed. 243, 245.

[123] Ibid., p. 246.

[124] See note 106 and accompanying text, supra.

CHAPTER III

HOSTILITIES ON THE BARBARY COAST

Historical Setting

The Barbary episode marks one of the earliest examples of the threat of force for diplomatic purposes on sole Presidential authority. The hostilities that ensued were fought almost entirely on the seas, although there was one land operation. Most of the actual fighting occurred subsequent to an act of Congress designed to authorize naval hostilities.

The Barbary coast stretches across two thousand miles of north Africa along the Mediterranean. This gave the Barbary regencies, Morocco, Algiers, Tunis and Tripoli, easy access to Mediterranean shipping lanes. As a result of long-standing enmity between Christian Europe and Moslem north Africa, the merchant ships of weaker European states were always in danger of being seized and of having their crews enslaved.

The Barbary nations would declare war, seize the enemy merchant ship on the high seas, and then sign a treaty, the terms of which always called for an annual tribute, in order to end the conflict. The Barbary rulers expected presents as part of the negotiating process, and there were often additional payments required in order to ransom crews held captive. After a time, if payments were in arrears

or suddenly thought to be inadequate, the flagstaff of the offending nation would be chopped down in a symbolic declaration of war, merchant ships would be seized, and the "diplomatic" process would begin anew.[1]

This practice had gone on continually since the sixteenth century, and if the European nations had not been competing with each other so fiercely, they might have combined and subdued the Barbary once and for all. Instead, each European country entered into the most advantageous treaty it could obtain, all the while hoping that the Barbary would continue to prey upon the ships of rivals. Benjamin Franklin quoted British merchants as saying, "if there were no Algiers, it would be worth England's while to build one."[2]

Thus, while the European nations referred contemptuously to the Barbary as "pirates," they accorded them a measure of international status by entering into treaties with them.

As the Americans developed a thriving sea trade on the Mediterranean, they too became vulnerable. No sooner

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[1]Ray W. Irwin, The Diplomatic Relations of the United States With the Barbary Powers, 1776-1816 (Chapel Hill, N.C.: University of North Carolina Press, 1931), pp. 1-19; Glenn Tucker, Dawn Like Thunder; The Barbary Wars and the Birth of the U.S. Navy (Indianapolis: The Bobbs-Merrill Company, Inc., 1963), pp. 43-56; Gardner W. Allen, Our Navy and The Barbary Corsairs (Boston: Houghton Mifflin Co., 1905), pp. 2-6.

[2]Quoted in Irwin, p. 17.

had the United States lost the protection of the British navy following the American Revolution than Algiers and Morocco began menacing its merchant ships.[3]

The United States was in a difficult position. It was heavily in debt and could not easily pay for Barbary diplomacy. It was also militarily weak, without any navy whatsoever. In 1784, under the Articles of Confederation, the Congress resolved to obtain treaties with the Barbary states, commissioning Adams, Franklin and Jefferson to arrange them.[4]

But Congress was less willing to provide the money needed for negotiating with Barbary. Adams thought this unwise. He wrote Jefferson on July 3, 1786 that it was "wisest for Us to negotiate and pay the necessary Sum."[5] Noting the value of American shipments in the Mediterranean, Adams observed,

> At present we are Sacrificing a Million annually to Save one Gift of two hundred Thousand Pounds. This is not good OEconomy...[6]

But Jefferson was more militant. If we must buy

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[3]Irwin, pp. 20, 25; Allen, p. 13.

[4]Irwin, p. 27.

[5]John Adams and Thomas Jefferson, The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams, ed. Lester J. Cappon, 2 vols. (Chapel Hill, N.C.: University of North Carolina Press, 1959), 1:139.

[6]Ibid.

peace, he responded to Adams on July 11, let us not delay. "But," he went on, "I should prefer the obtaining it by war."[7]

While still governed by the Articles, the United States did manage to obtain a treaty with Morocco,[8] but this did not insure against attacks by the other Barbary states. In 1793, Algiers, the most powerful of them, seized eleven American vessels and took 109 men captive.[9]

Congress responded by voting for a naval armament, with the proviso that ship construction stop should peace with Algiers be obtained. President Washington signed the measure into law on March 27, 1794.[10] The preamble made Congressional motives crystal clear.

> . . . the depredations committed by the Algerine corsairs on the commerce of the United States render it necessary that a naval force should be provided for its protection . . .[11]

While construction of six ships was underway, a rather expensive treaty with Algiers was obtained,[12] and Washington asked Congress whether it wanted him to stop

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[7]Ibid., p. 142.

[8]United States, Department of State, Treaties and Other International Agreements of the United States, 1776-1949, comp. Charles I. Bevans (Washington: Government Printing Office, 1971), 9:1278; "Treaty of Peace and Friendship," TS No. 244-1, 15 July 1786.

[9]Irwin, p. 60.

[10]An Act to provide a naval armament, 1 Stat. 350 (1794).

[11]Ibid.

[12]U. S. Treaties and Other International Agreements, 5:32 "Treaty of Peace and Amity," TS No. 1, 7 March 1796.

construction in light of the "loss which the public would incur."[13] In a compromise, Congress authorized completion of three of the ships: the "Constitution," the "United States," and the "Constellation."[14]

This was the beginning of the United States Navy. And none too soon, because the expensive settlement with Algiers only served to whet the appetites of the other Barbary rulers. First Tunis, and then Tripoli commandeered American vessels in 1796.[15] After intervention by Algiers an agreement with Tripoli was arranged in the following year.[16] But it took nearly the whole period of the Adams administration to arrive at a satisfactory pact with Tunis.[17]

While Adams was President (1797-1801) relations with Barbary were complicated by the naval war with France. The Quasi War so preoccupied the United States that it could not respond anywhere else militarily. During this period, problems in the Mediterranean mounted.

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[13]James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents, 1789-1897, 10 vols. (Washington: Government Printing Office, 1896), 1:193.

[14]An act supplementary to an act entitled "an act to provide a naval armament," 1 Stat. 453 (1796).

[15]Irwin, pp. 84-91.

[16]U.S. Treaties and Other International Agreements, 11:1070 "Treaty of Peace and Friendship," TS No. 358, 10 June 1797.

[17]Ibid., p. 1088 "Treaty of Amity, Commerce, and Navigation," TS No. 360, ratified 10 January 1800.

In 1799, the Bey of Tunis, angered by the failure of the United States to deliver certain supplies as promised, demanded new gifts and threatened war.[18] At the same time, the Pasha of Tripoli, envious of what he regarded as the more favorable treatment of Algiers and Tunis, threatened and made new demands upon the American consul.[19]

In September, 1800, an American brigade was seized by Tripoli and held for nearly a month.[20] Finally, the United States was humiliated by the Dey of Algiers, who impressed an American frigate and forced it to sail to Turkey under the Algerine flag.[21]

Were it not for the Quasi War, the Barbary coast hostilities might well have occurred during the Adams administration. Consider this excerpt from a letter of Adams' Secretary of State.

> The importance of sending a naval force into the Mediterranean, to shew the Barbary powers our capacity to defend our commerce, and to annoy them, has been repeatedly urged;...and should our differences with France be settled by our Envoys now at Paris, and either of the Regencies break their peace with

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[18] Irwin, pp. 98-99.

[19] Ibid., p. 96.

[20] Ibid., p. 97.

[21] Ibid., pp. 94-95.

us, our whole naval force may be sent against them...[22]

On the other hand, as a result of the pressures of the Quasi War, Congress, in 1798, authorized the President to buy, build, borrow or accept as gifts additional frigates and up to two dozen smaller war ships. Furthermore, a separate naval department was created.[23]

By the conclusion of the Adams administration in March, 1801, the United States had obtained treaties with all of the Barbary states. Despite this, diplomatic relations were deteriorating, and American commerce in the Mediterranean was increasing.[24] Most portentious of all was the fact that the United States had built up a naval force during the Quasi War with France, and by late 1800 that war was over.

The Tripolitan War

Thomas Jefferson assumed the office of President in March, 1801. By April, he had already decided to send some United States warships on a cruise to the Mediterranean.[25] "It is conceived," Samuel Smith of the Navy De-

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[22]U.S., Office of Naval Records and Library, Naval Documents Related to the United States Wars with the Barbary Powers, 6 vols. (Washington: Government Printing Office, 1939-44), 1(1939):343.

[23]See my chapter two, supra.

[24]Irwin, p. 101.

[25]So wrote Samuel Smith on April 1, 1801. Smith was performing the duties of the Secretary of the Navy. Naval Documents, 1:425.

partment wrote on April 10, 1801, "...that such a squadron Cruizing in view of the Barbary Powers will have a tendency to prevent them from seizing on our Commerce, whenever Passion or a Desire of Plunder might Incite them thereto."[26]

On May 20, 1801, Secretary of State James Madison sent the following message to the United States consuls at Tunis and Algiers:

> The proofs which have been given by the Bashaw /Pasha/ of Tripoli of hostile designs against the United States have, as you will learn from Commodore Dale, determined the President to send into the Mediterranean a squadron of three frigates and a sloop of war, under the command of that officer. Should war have been declared, or hostilities commenced, this force will be immediately employed in the defence and protection of our commerce against the piracies of that regency...[27]

Madison then explained why they had decided to send a naval force to the Mediterranean at this time.

> The present moment is peculiarly favorable for the experiment, not only as it is a provision against an immediate danger, but as we are now at peace and amity with all the rest of the world, and as the force employed would, if at home, be at nearly the expense, with less advantage to our mariners...[28]

On the same day, orders were given to Captain Richard Dale from the office of the Secretary of the Navy. "I am therefore instructed by the President to direct," the orders stated,

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[26]Naval Documents, 1:429.

[27]Ibid., p. 460.

[28]Ibid.

> that you proceed with all possible expedition, with the squadron under your command, to the Mediterranean. It will be proper for you to touch at Gibraltar...on your arrival at Gibraltar you will be able to ascertain whether all or any of the Barbary Powers, shall have declared War against the United States...[29]

Should he find that all is "tranquil," Dale's instructions were to proceed to each Barbary port in turn, informing the American consuls there that his intentions are "perfectly friendly," deliver presents to Algiers, and present letters to the rulers of Algiers and Tunis and a message from President Jefferson to the Pasha of Tripoli, explaining the purpose of the mission.[30] "But," Dale's orders continued,

> should you find on your arrival at Gibraltar that all the Barbary Powers, have declared War against the United States, you will then distribute your force in such a manner, as your judgment shall direct, so as to best protect our commerce and chastise their insolence--by sinking, burning or destroying their ships and Vessels wherever you shall find them...[31]

Finally, Dale was instructed to establish a blockade off the ports in question if Algiers alone or Tunis and Tripoli, either separately or in combination, had declared war, "so as effectually to prevent any thing from going in or coming out."[32]

The Congress, it should be noted, was not in session, having adjourned in March, 1801, not to meet until December

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[29]Ibid., p. 465.

[30]Ibid., pp. 465-466.

[31]Ibid., p. 467.

[32]Ibid.

of that year.[33] Therefore, Jefferson undertook this action on his own authority.

While Dale was receiving his orders, unbeknownst to the administration at the time, the Pasha of Tripoli declared war against the United States, symbolically chopping down the American flagstaff on May 14, 1801.[34] When Dale arrived at Gibraltar, July 1, the American consul there led him to believe that Tripoli had commenced hostilities.[35] Dale felt his suspicions confirmed by the presence of two Tripolitan ships at anchor. And, although the Tripolitan commander denied being at war with the United States, Dale was convinced that the cruisers were headed for the Atlantic in search of American merchantships.[36] Accordingly, he ordered an American frigate to remain at Gibraltar to keep watch over the Tripolitan vessels.

Dale then sailed to Algiers and then to Tunis; both stops were uneventful. On July 24, 1801, he reached Tripoli and informed the Pasha that in response to his decla-

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[33]U.S., Congress, Debates and Proceedings in the Congress of the United States, 1789-1824 (Washington: Gales and Seaton, 1834-56), 10:1082, 11:10. /Hereinafter cited as "Annals"/.

[34]Irwin, p. 106.

[35]Naval Documents, 1:497.

[36]Ibid.

ration of war, he would commence hostilities against any Tripolitan vessels he encountered. In fact, however, very little occurred, and Dale lifted the blockade shortly thereafter.[37]

One exchange between the American schooner, "Enterprise," and a Tripolitan vessel resulted in the defeat of the Barbary craft, which was stripped of gear and left free to limp back to port.[38]

Excepting the victory of the "Enterprise," Dale's fleet accomplished little else in 1801, other than blockading the two Tripolitan ships at Gibraltar, and convoying American merchantmen through the Mediterranean.[39]

When the seventh Congress opened its first session in December, 1801, President Jefferson forwarded his annual message. In it he informed Congress of hostilities with Barbary. "To this state of general peace with which we have been blessed," he noted,

> one only exception exists. Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and

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[37]Allen, Barbary, pp. 97-99.

[38]Irwin, pp. 109-110.

[39]Ibid., p. 109.

> salutary. The Bey [sic] had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger.[40]

Jefferson went on to describe the successful encounter of the "Enterprise" with a Tripolitan cruiser, explaining the failure of the American ship to take the prize as follows.

> Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.[41]

Writing as "Lucius Cassius," Hamilton derided Jefferson's explanation of the failure to seize the Tripolitan vessel.[42] Hamilton rejected the "extraordinary position" that the President was somehow limited by the Constitution in ordering a response to a declaration of war by another country. The Constitution, Hamilton ob-

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[40]President Jefferson's First Annual Message, December 8, 1801, Richardson, 1:326-327.

[41]Ibid., p. 327.

[42]Alexander Hamilton, "Lucius Cassius No. 1," in The Works of Alexander Hamilton, ed. Henry Cabot Lodge, 12 vols. (New York: G.P. Putnam's Sons, n.d.), 8: 246-52.

served. contains no such "express prohibitions" upon the President.

> That instrument has only provided affirmatively, that, 'The Congress shall have power to declare war;' the plain meaning of which is, that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only, to go to war. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary.[43]

In short, while Hamilton concedes that only Congress can commence a war on behalf of the United States, he insists that the President needs no legislative authorization to order a full response to war commenced or declared by another nation.

Nearly a week after Jefferson's address, the Committee of the Whole of the House of Representatives proposed that the President be authorized "further and more effectually to protect the commerce of the United States against the Barbary Powers."[44] Debate ensued the next day, December 15. An amendment was offered to expunge the words, "further and more," as they might be interpreted as authorizing the President to increase the navy at his discretion. The amendment failed, however, and a committee was formed to propose

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[43] Ibid., pp. 249-250, emphasis in the original.

[44] Annals, 11:325-326.

appropriate legislation.[45]

On Thursday, January 7, 1802, Representative Smith reported a bill "for the protection of American commerce and seamen in the Mediterranean," empowering the President to equip and employ vessels as he sees necessary, to commission privateers, and to capture Tripolitan ships.[46] The House Committee of the Whole debated the bill briefly on the 21st, rejecting amendments to broaden it to cover the other Barbary states.[47] The debates reported in the Annals of Congress raise the constitutional question of the President's war-power only obliquely. We can infer that there was some unrecorded debate of such nature from the comments of Representative Bayard of Delaware. It is reported that Bayard

> wished it left to the direction of the President to exercise the power vested in him when he should think proper...He wished the President to do this by the authority of law; this would prevent those doubts that have been expressed, by some, of the constitutionality of his measures...The gentleman from Connecticut ...says there are no doubts on his mind but that the President has a Constitutional right, as the Commander-in-Chief of the Army and Navy, to do as he has done; but it should be remembered that many have doubts...[48]

Early in February, 1802, the House agreed to certain

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[45]Ibid., pp. 326-39.

[46]Ibid., pp. 405-406.

[47]Ibid., pp. 432-433.

[48]Ibid., p. 432.

Senate amendments to the proposal, entitled, "An Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers."[49] The measure became law on February 6, 1802. Its preamble and first two sections read:

> Whereas the regency of Tripoli, on the coast of Barbary, has commenced a predatory warfare against the United States:
>
> Be it enacted...That it shall be lawful fully to equip, officer, man, and employ such of the armed vessels of the United States, as may be judged requisite by the President of the United States, for protecting effectually the commerce and seamen thereof on the Atlantic Ocean, the Mediterranean and adjoining seas.
>
> Sec. 2. And be it further enacted, That it shall be lawful for the President of the United States to instruct the commanders of the respective public vessels aforesaid, to subdue, seize, and make prize of all vessels, goods, and effects, belonging to the Bey /sic/ of Tripoli, or to his subjects...and also to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.[50]

The last three of its five sections deal with privateers and the length of service for American seamen.

In accordance with the statute, the President and Secretary of the Navy signed orders to all ships of war, directing them to seize and make prize of Tripolitan vessels.[51] Plans were readied to send a relief squadron to the Mediterranean--Dale's fleet was still there--and

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[49] Ibid., p. 474.

[50] 2 Stat. 129 (1802).

[51] Naval Documents, 2:60

Captain Richard V. Morris was ordered to take command on March 11, 1802.[52]

On March 20, Morris was ordered to seize and make prize of all Tripolitan vessels, to blockade the port of Tripoli and convoy American vessels as far as could be done consistent with the blockade.[53]

On April 20, the administration decided to reaffirm its desire for treaty negotiations. Instructions from Secretary of the Navy Smith, received months later in the Mediterranean by Morris included the following,

> The President conceiving that the period has arrived when negotiations for peace with the Bashaw /Pasha/ of Tripoli may be opened under circumstances which promise an advantageous issue.../it/ has been determined to lay all our Naval force under your command before Tripoli...Holding out the olive Branch in one hand & displaying in the other the means of offensive operations, may produce...an advantageous treaty...[54]

Morris arrived at Gibraltar on May 25, where he remained through August, occasionally convoying American ships through the Straits, blockading one of the Tripolitan cruisers at Gibraltar, repairing his ship, the "Chesapeake," and standing by in response to reports of Moroccan threats.[55]

During this summer (of 1802) relations with Barbary

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[52]Ibid., p. 82.

[53]Ibid., p. 92.

[54]Ibid., p. 130.

[55]Irwin, p. 114.

deteriorated rapidly. Morocco, heretofore peaceful, declared war on the United States in June, when both Commodores Dale and Morris refused passports to ships carrying grain from Morocco to Tripoli. Tripoli, taking advantage of the large number of American merchantships in the Mediterranean, captured a brig on June 17, took it to Algiers, and presented its crew to the Dey as a gift. The Bey of Tunis meanwhile, repeatedly demanded that an American warship be built for him. Finally, Algiers continually protested the delay in payment of annuities as stipulated by treaty; the Dey refused cash instead of military and naval stores; and he demanded that the American consul be replaced.[56]

That summer, too, Sweden, which had been at war with and consequently was blockading Tripoli, made peace, and removed its vessels.[57] The two remaining American ships were soon forced to leave for supplies; and when no ship from Morris' fleet replaced them, Tripoli's harbor stood unobstructed.[58]

By all accounts the Morris mission was a failure, although it would seem that full blame could not fairly be attributed to the Commodore. Nevertheless, the admin-

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[56]Ibid., pp. 119-120.

[57]Ibid., p. 123.

[58]Allen, Barbary, p. 111.

istration despaired of losing whatever advantage the more militant policy was to have given them, and planned, in the spring of 1803, major concessions to obtain peace.[59] Congress, meanwhile, appropriated money for the construction of four smaller, swifter craft, like the "Enterprise," apparently hoping such vessels would be more effective.[60]

Morris established his long-delayed blockade of Tripoli in late May, 1803. After a skirmish with some Tripolitan boats, and additional unsuccessful negotiations with the Pasha, the Commodore lifted the blockade (June 26, 1803), believing it unnecessary, and fearing renewed hostilities with the other Barbary states.[61]

Morris was then recalled by the Secretary of the Navy, censured by a court of inquiry for lack of "'diligence or activity'" in operations against Tripoli, and had his commission revoked by the President. A new squadron, to be headed by Captain Edward Preble, was readied in the spring and summer of 1803, to replace Morris' fleet. The Preble squadron consisted of seven ships, five of which were small gunboats. Preble's orders were essentially like Morris', with emphasis on maintaining a blockade of Tripoli.[62]

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[59]Irwin, p. 128.

[60]Act of February 28, 1803, 2 Stat. 206; Allen, Barbary, p. 136.

[61]Irwin, p. 127.

[62]Ibid., p. 129.

While Preble's squadron was sailing (each ship left the United States on its own, at about two-week intervals throughout the summer of 1803), Morocco seized an American merchantship. One of Preble's ships caught the Moroccan vessel however, freed the American captives, and hauled the boat to the port of Tangier to negotiate with the Emperor. Negotiations proved successful; Morocco agreed to ratify the treaty of 1786 and recognize the blockade of Tripoli.[63]

Two of Preble's fleet, the frigate "Philadelphia," and the smaller "Vixen" were dispatched to Tripoli to establish a blockade in October, 1803. The smaller ship left after a few weeks to search for Tripolitan vessels. Two weeks later, the "Philadelphia" ran aground pursuing a Tripolitan ship, and was captured with its crew of over three hundred. The Pasha then raised his price for ransom and peace substantially. But in February, 1804, Stephen Decatur and a small band of followers successfully executed a bold plot to destroy the "Philadelphia."[64]

This angered the Pasha, but did not bring him to terms; and, of course, he still held the crew. Negotiations between Preble and the Barbary ruler continued without progress in June. In July, Preble brought his whole squad-

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[63]Ibid., pp. 132-133.

[64]Ibid., pp. 132-35.

ron to Tripoli, along with eight vessels belonging to the King of the Two Sicilies, also at war with Tripoli. In August a battle ensued in which three Tripolitan vessels were captured and the city of Tripoli was shelled. Thereafter, the Pasha reduced his demands considerably, but still no agreement could be reached.[65]

During this time period--spring and summer of 1804--tensions with Tunis mounted. The Bey of Tunis had been angered when a Tripolitan vessel carrying property owned by a Tunisian subject was captured by the "Enterprise" in the fall of 1803. Commodore Morris went to Tunis to try and negotiate. After going on shore and agreeing to return the seized goods, additional demands were made. Morris was detained and held until he agreed to the payments.[66] Upon learning of the capture of the "Philadelphia" by Tripoli, the Bey threatened war and prepared during the winter and spring for attacks upon American commerce. When Preble arrived in the Mediterranean, he wrote home for additional ships to meet the Tunisian threat and went to Tunis to negotiate--but remained on his ship. Preble wrote the Bey, assuring him satisfactory indemnification for his seized goods; by the end of April, 1804, an agreement was

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[65]Ibid., pp. 138-139.

[66]Ibid., pp. 124-125.

reached.[67]

In May, 1804, the Bey of Tunis renewed his theats at the report of Tunisian craft captured by the United States. Nothing come of this however, and by summer's end a grain shortage in Tunis wholly diverted the Bey's attention. Thus ended the Tunisian threat.[68]

Back home, the eighth Congress briefly debated and passed an extension of the act to protect commerce and seamen of 1802. In addition to its authorization of an import duty to defray the cost of naval operations, the act of March 26, 1804 empowered the President to order naval operations against any hostile Barbary power. The first section explains that its purpose is to defray the expense of

> equipping, officering, manning, and employing such of the armed vessels of the United States as may be deemed requisite by the President . . . for protecting the commerce and seamen thereof, and for carrying on warlike operations against the Regency of Tripoli, or any other of the Barbary Powers, which may commit hostilities against the United States. . .[69]

The Act was to remain in effect until three months after the President ratified a treaty of peace with Tripoli, "unless the United States should then be at war with any other of the Barabary Powers."[70]

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[67]Ibid., pp. 140-141.

[68]Ibid., pp. 141, 142.

[69]Annals, 13:1210-25; 2 Stat. 291 (1804).

[70]2 Stat. 291 (1804).

The Tripoli question was still unresolved when William Eaton, former United States consul to Tunis, secured in 1803, the President's permission to conduct land operations in Tripoli.[71] The plan, hatched by Eaton and James L. Cathcart, who served as consul to three of the Barbary states, had been outlined as early as 1801.[72] It called for American support for a coup d'etat by a brother of the Pasha of Tripoli, in the hope that the brother, indebted to the United States for helping him to power, would do nothing counter to American interests in the Mediterranean.[73]

Another relief squadron of four frigates was sent to the Mediterranean, with Samuel Barron to replace Preble as squadron commander. The administration left it up to the fleet commander to decide whether or not to adopt the plan to aid the rival brother. Barron arrived in the Mediterranean--with Eaton aboard--in September, 1804. The Pasha, meanwhile, had driven his brother into exile, but Eaton persuaded Barron to let him go to Egypt to arrange for the rival's return. The "Argus" took Eaton to Cairo on December 8, 1804.[74]

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[71]Irwin, p. 143.

[72]Ibid., pp. 110-111, note 25, p. 111.

[73]Ibid.

[74]Allen, Barbary, pp. 220, 229.

Meanwhile, the brother, named Hamet Karamanli, was engaged in an uprising in Egypt against Ottoman rule; this delayed their meeting until early February, 1805. Hamet and Eaton worked out a written convention providing for the United States to do everything consistent with its honor and interest to establish Hamet as sovereign of Tripoli.[75] For his part, Hamet agreed to indemnify the United States for its expenses with tribute money from other states, to release Americans held prisoner in Tripoli, and to form a permanent peace treaty with the United States without tribute.[76]

A force of approximately four hundred men (three hundred Arabs, only ten Americans and about ninety others of various nationalities) was formed, with Eaton as commander. The plan was to march overland to Derne, an eastern province of Tripoli, where they would attack, and with the help of American sea forces which were to meet them, put Hamet into power. After an arduous trek over about five hundred miles of Libyan desert, Eaton's force attacked the city of Derne, on April 27, 1805, while three small American gunboats shelled the other side of town. The Pasha's reinforcements were barely beaten off and the town was held. No sooner had this occurred when a message was received

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[75]Ibid., 230-32.

[76]Ibid.

stating that a treaty with the Pasha had been obtained and that Eaton's forces were to be withdrawn from Derne.[77]

Throughout the winter and spring of 1804-05, the United States maintained a blockade of Tripoli.[78] Commodore Barron, meanwhile, was becoming increasingly dissatisfied with Eaton's plan to restore Hamet. Barron had no confidence in Hamet; he thought the approximately five hundred-mile march from Derne to Tripoli too long and hazardous; he feared for the American prisoners, should the Pasha be pushed too hard; he did not think he was authorized to commit the United States to the restoration of Hamet; and finally, his own failing health made him anxious to conclude a treaty with Tripoli and quit the Mediterranean.[79]

In early 1805, the Pasha seemed anxious for peace. Consul-General to Barbary Tobias Lear arrived at Tripoli May 26, 1805 to begin negotiations. An exchange of prisoners was agreed to, with the United States paying sixty thousand dollars since it had the fewer captives. The treaty called for the Americans and Hamet to withdraw immediately from Derne, and for the restoration of Hamet's family to him. A secret clause, however, gave the Pasha

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[77]Irwin, pp. 147-148.

[78]Allen, Barbary, p. 221.

[79]Irwin, pp. 149-52.

four years to release the family. The treaty established peace between Tripoli and the United States, without annuities or payments beyond the customary gifts upon an exchange of consuls. It also provided that captives would not be enslaved in future conflicts, that passports for ships would be provided. The agreement was completed in early June, 1805.[80]

The treaty aroused controversy in the United States. It was suggested by some that the sixty thousand dollars ransom fee was unnecessarily high, or not necessary at all. Another stir was created over treatment of the Pasha's brother, who claimed, in a letter "to the People of the United States," that his compact with Eaton included assurances that the throne would be recovered for him. There might have been more commotion had the secret clause granting the Pasha four years to return Hamet's family been made public. (The secret agreement was revealed in 1807, and even the Jefferson administration expressed surprise at its existence.) Finally, many felt that Barron and Lear acted hastily in prohibiting Eaton from attempting a siege on the city of Tripoli.[81]

Nevertheless, the Senate ratified the treaty, 21-8, on April 12, 1806, thus formally ending hostilities with

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[80]Ibid., pp. 152-54.

[81]Ibid., pp. 154-59.

Tripoli.[82]

Later Relations with Barbary

While Tobias Lear was negotiating an end to the Tripolitan war in 1805, troubles were brewing with Tunis once again. In late April, 1805, a small Tunisian craft with two prizes it had taken tried unsuccessfully to run the blockade at Tripoli. Tunis then threatened war when the American squadron commander, John Rodgers, who had succeeded the ailing Samuel Barron, refused to release them.[83]

Once the treaty with Tripoli was negotiated, Rodgers decided to settle with Tunis. By August, 1805, the bulk of the United States squadron was in Tunis harbor. The Bey of Tunis now agreed to renew the treaty of 1797, and send an ambassador to the United States to dispose of the issue of the captured Tunisian vessels. These negotiations proved difficult, but no hostilities ensued, and in January, 1807, under pressure of war with Algiers, the Bey of Tunis accepted ten thousand dollars as indemnification for his losses. After this relations with Tunis remained fairly satisfactory.[84]

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[82]Ibid., p. 154; U.S. Treaties and Other International Agreements 11:1070 "Treaty of Peace and Amity," TS No. 359, 17 April 1806.

[83]Irwin, p. 161.

[84]Ibid., pp. 166-167.

Shortly thereafter, when relations between the United States and England worsened, the American fleet was gradually withdrawn from the Mediterranean altogether. With the protection of the American navy gone, shipping was once again vulnerable. In 1807, the Dey of Algiers seized three merchantships when the United States failed to deliver naval supplies as stipulated by treaty. Later, the Dey released the ships in exchange for cash. In 1808 he renewed his demands for naval stores, and might have taken further action had not an American storeship arrived. From 1808-12, relations with Algiers were good.[85]

In the summer of 1812, at the instigation of the British, Algiers rejected as insufficient the tribute brought by an American ship, ordered Consul-General Lear to depart, and threatened to keep the supply-ship and enslave all Americans if the difference were not made up immediately in cash. Lear borrowed the money and obtained release of the ship, and then left Algiers. The Dey then sent his cruisers out in search of American merchantships. In late August, 1812, Algiers seized an American brigade and its crew of eleven. With the War of 1812 now underway, the United States was unable to pass through the Straits of Gibraltar, which were blocked by the British navy. As

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[85]Ibid., pp. 168-71.

a result it could neither meet Algiers' threats, nor continue to trade heavily in the Mediterranean.[86]

When the war with England ended, the administration of James Madison sought to reckon with Algiers. On February 23, 1815, Madison sent a message to Congress reminding that body of the Dey's mistreatment of Lear, other "acts of...overt and direct warfare," and the holding and rough treatment of American citizens in Algiers. Madison went on to note that the end of the war with England would mean renewed American trade in the Mediterranean, "within the range of the Algerine cruisers." He concluded by recommending to Congress "an act declaring the existence of a state of war between the United States and the Dey and Regency of Algiers."[87]

On March 2, 1815, the Congress passed "An Act for the protection of...Commerce...against the Algerine cruisers," whose wording was much the same as the Act of February 6, 1802, except that it was directed at the Dey of Algiers instead of the Regency of Tripoli.[88]

Additional motivations for the aggressive American policy at this juncture were the small size of Algiers' navy, and her hostile relations with Italy, Spain, Holland,

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[86]Ibid., pp. 171-73.

[87]Richardson, 1:554.

[88]Annals, 28:1275-80; 3 Stat. 230 (1815).

Prussia, Denmark and Russia--all at the same time. Accordingly, two squadrons were formed, one to be headed by William Bainbridge, the other by Stephen Decatur. The commanders were instructed to obtain an early peace without tribute or presents and to arrange the release of American prisoners.[89]

Decatur's flotilla arrived at Gibraltar June 15, 1815, and proceeded to capture two Algerine vessels. He then sailed to Algiers, agreed to return the vessels and demanded ratification of a treaty calling for the abolition of tribute, release of American prisoners, indemnification for the ship seized in 1812, restoration of other American property, and the treatment of future captives as prisoners of war rather than slaves. The Dey agreed to the treaty.[90]

Early in 1815, Tunis and Tripoli permitted prizes seized from the British by American privateers and brought into the Barbary ports, to be retaken by England. The United States protested this action, claiming a violation of treaties, but to no avail. So after concluding the pact with Algiers, Decatur, on his own authority, sailed to the other Barbary ports where he successfully demanded indemnification for loss of the prizes. Bainbridge followed Decatur with a show of force in Tunis, Tripoli and

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[89]Irwin, pp. 176-177.

[90]Ibid., pp. 177-79.

Algiers, and both squadrons sailed for home in October.[91]

Late in December, 1815, the Senate approved and the President ratified the new treaty with Algiers. But the Dey chafed under the agreement, which he considered humiliating, and complained that one of the vessels captured by Decatur was never returned. As of the spring of 1816, the Dey refused to exchange ratifications of the treaty. Hostilities might have been renewed had not a third party intervened. That summer a fleet of Dutch and British ships under Lord Exmouth attacked Algiers, virtually destroying their fleet and doing considerable damage to the city.[92]

When an American flotilla appeared in October, 1816, Algiers was still in disarray. After receiving instructions, the American negotiators sent the Dey an ultimatum with which he reluctantly complied. The result was a renewal of the treaty which the Dey had agreed to, then rejected. The most advantageous American negotiations with Barbary were thus concluded in December, 1816. (Curiously enough, this last treaty, by some error, was not approved and ratified until 1822.) After this date, American relations with Barbary remained peaceful.[93]

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[91]Ibid., pp. 180-181.

[92]Ibid., pp. 182, 184-185.

[93]Ibid., pp. 185-186.

Conclusion: The Barbary Conflicts and the Constitution

The principal constitutional issues surrounding the conflicts with Barbary concern: (1) the international status of the Barbary powers, and the effect of their status (if any) on the decision to use force against them; (2) President Jefferson's unilateral decision to order Dale's fleet to the Mediterranean, and the hostilities attendant to Dale's mission; (3) the nature of the Congressional acts of February 6, 1802 and March 2, 1815; and, (4) the actual conduct of the Barbary wars.

(1) If, as was often bitterly alleged by their victims, the Barbary were no more than pirates, then the war-declaring power of Congress (Article I, section 8, paragraph 11) might be considered irrelevant on the grounds that war is only declared against states, not pirates. On the other hand, the power of dealing with piracy was explicitly granted to the Legislature by Article I, section 8, paragraph 10 of the Constitution, which gives Congress power

> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.

Pirates were generally viewed as individual miscreants, roaming the seas purely for personal gain. They were distinguished from those seafaring predators who acted as agents of a state. Pirates were, by their crimes, "dena-

tionalized"--associated with no state--which is why they were subject to lawful capture by the ships of any nation.[94] As was the custom of the day, the United States Constitution provided for the granting of letters of marque and reprisal (Article I, section 8, paragraph 11), which were governmental commissions for private ships to prey on the vessels of its enemies. Ships thus commissioned were distinguished from mere pirates.[95]

Judging by their practice of selective depredations in accordance with the foreign policy of their rulers, the Barbary corsairs seem more like privateers than pirates.

The fact that the United States entered into diplomatic relations with the Barbary powers is further evidence that they were states and not mere pirates. Prior to Commodore Dale's mission in 1801, the United States negotiated, and ratified with Senate approval as is constitutionally required, three treaties, each with a different Barbary regency.[96] Thus, as of 1801, all of the Constitutional procedures for engaging in relations with a foreign state were strictly observed with the Barbary powers.

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[94]Citing Grotius, Fenwick states that "a body of pirates did not constitute a state and...the laws of war did not apply to their acts..." Charles G. Fenwick, International Law 4th ed. (New York: Appleton-Century-Crofts, 1965), p. 504.

[95]Fenwick, p. 505.

[96]See notes 12, 16 and 17, supra. A fourth treaty, with Morocco, was made during the period of the Articles of Confederation. See note 8, supra.

Furthermore, in his message to the Congress justifying Dale's mission, President Jefferson never suggested that the United States confronted simple piracy. To the contrary, he noted that Tripoli had declared war, that he had ordered defensive measures, which is why no prizes were taken, and that the legislature was invited to authorize measures of offense.[97]

We conclude, therefore, that the Barbary corsairs were not pirates, and that the Constitutional procedures for engaging in hostilities with a foreign state applied to them.

(2) Dale's small fleet of warships was ordered by President Jefferson to the Mediterranean while Congress was not in session. Thus, the decision to undertake hostilities against the Barbary states was initiated by the Commander in Chief (of the Navy) rather than the Congress.

This statement is subject to some qualification, however. When Congress established the naval force in 1794, it explicitly declared its purpose to be the protection of American commerce against "the depredations of the Algerine corsairs."[98]

However, this act was to go out of effect after the 1795 treaty with Algiers, and so Congress passed a supple-

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[97]See notes 40 and 41 and accompanying text, supra.

[98]See note 10, supra.

mentary act in 1796, authorizing the President to "continue the construction and equipment" of three of the war ships. The 1796 supplement said nothing about the use of the vessels.[99]

While it may be argued that Congress intended some degree of Presidential discretion in the use of the naval force when it first authorized construction, the naval armament acts could hardly be considered explicit approval for Dale's mission. In addition, there is no evidence of any prior consultation by the President with Congress or its members.

Jefferson justified his orders to Dale on the grounds that he never directed anything "beyond the line of defense."[100] Writing as "Lucius Crassus," Hamilton ridiculed this line of argument. But Hamilton's charge was that Jefferson had underrepresented Presidential power, rather than that he exceeded his authority.

Jefferson had instructed Dale to be prepared for hostilities. He was directed to destroy foreign ships and blockade foreign ports only if war had been declared or if attacks on American ships had begun. While such instructions clearly contemplate defensive action, the dispatch of war ships all the way to the Mediterranean may in itself

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[99]See note 14, supra.

[100]Richardson, 1:327.

have been provocative. At the least, the mission was intended as a show of force in order to intimidate the Barbary rulers.

Since there is no evidence that Congress challenged Jefferson's action or questioned his explanation, the practice of Presidents unilaterally ordering the armed forces abroad in a show of force gained approval. Jefferson's action, in fact, if not in law, enhanced the war making powers of the President.

(3) Congress did formally approve hostilities with Tripoli on February 6, 1802, although Hamilton was surely correct in saying that a Congressional declaration is unnecessary if the other party has declared war. Nevertheless, the "Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers," however clear its intent, may not have been, in form, a declaration of war.

The Act stated that Tripoli had "commenced a predatory warfare against the United States," and that in response, the President may, as he sees fit, employ armed vessels to "subdue, seize and make prize of" Tripolitan ships, or undertake other acts of hostility "as the state of war will justify, and may, in his opinion, require."[101]

And again, on March 2, 1815, similar words were used

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[101]See note 50, supra.

to authorize the President to undertake hostilities to protect commerce from the Algerine cruisers even though President Madison expressly requested a declaration of war. Why the Congress resorted to this form is not entirely clear. Perhaps it reflects the limited nature of the conflict, or perhaps the desire of Congress to permit the President to determine whether or not, when, and in what amounts force was necessary.

Whatever the motivation, the form of these acts contrasts clearly with the form of the act authorizing hostilities with England in 1812. Here the Congress explicitly trumpeted that "war be and the same is hereby declared to exist" between the United States and Great Britain; even the title of the legislation was: "An Act declaring war between the United Kingdom...and the United States..."[102]

In conclusion, the Acts of February 6, 1802 and March 2, 1815 would seem to be Congressional authorizations of hostilities just short of a declaration of war, further establishing that Congress may authorize hostilities without declaring war.

(4) Finally, we consider the constitutional issues raised by the actual conduct of the Barbary wars. Three

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[102] 2 Stat. 755 (1812). This Act also states "that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect..."

belligerent operations in particular are of questionable legality. First was Dale's blockading of two Tripolitan vessels anchored at Gibraltar.

Dale was ordered to stop at Gibraltar and learn the disposition of the Barbary powers toward the United States. He was only to take bellicose action upon learning that war had been declared. The American consul at Gibraltar informed him of Tripoli's hostile designs, but the admiral of the Tripolitan vessels denied that war existed. Nevertheless, Dale proceeded to block the ships.[103]

Given the contradictary claims of the Tripolitan and the American consul, was Dale's action warranted? We would have to conclude that it was. Despite their commander's protests, the Tripolitan vessels were, themselves, evidence that the Pasha of Tripoli had dispatched his cruisers in search of prey. The warnings of the consul only confirmed this. In fact, Tripoli had declared war against the United States a month and a half before Dale arrived. In sum, the constitutionality of the decision to send Dale to the Mediterranean notwithstanding, this particular phase of his mission was legal.

The second activity of dubious constitutionality is Eaton's land mission in Tripoli. Was the plan to instigate and support a coup d'etat in order to place into power

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[103]See text accompanying notes 29-36, supra.

someone sympathetic to American interests warranted by the Act of February 6, 1802? The Act fell short of a declaration of all-out war and called, essentially, for naval action to protect United States merchantships and crews. On the other hand, the second section authorized the President to instruct the commander of the naval squadron "to cause to be done all such other acts of precaution or hostility as the state of war will justify..."[104]

President Jefferson approved Eaton's plan in 1803; once again, without any consultation with Congress. It was left to squadron commander Samuel Barron to decide whether or not to pursue the plan, and by the fall of 1804 he had been persuaded. Was Eaton's mission, then, an "act of precaution or hostility" justified by the state of war, in the words of the Act of 1802?

Broadly interpreted, these words of the Act would seem to warrant any action suitable to wartime at Presidential discretion. It is possible, however, that the Congress was thinking merely of a naval blockade of the port of Tripoli. The legality of Eaton's land mission thus depends upon one's interpretation of the imprecise words of the legislation.

The third issue surrounds Stephen Decatur's action as commander of the American fleet in the Mediterranean in ac-

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[104] 2 Stat. 129 (1802), emphasis added.

cordance with the Act of March 2, 1815. The Act was specifically directed at Algiers, but Decatur, after having dealt with the latter state, proceeded to Tunis and then to Tripoli. His fleet conducted a show of force at both these ports, but engaged in no hostilities. Decatur undertook this action on his own initiative,[105] but of course he acted under color of Presidential authority.

William Bainbridge, who commanded the second American squadron in the Mediterranean at the time, followed Decatur with a similar display of might in Algiers, Tunis and Tripoli. Were these actions before Tunis and Tripoli warranted by the 1815 legislation? We would conclude in the negative. The success of the missions--treaties were obtained from Tunis and Tripoli without any hostilities--made any criticism unlikely. Nevertheless, Madison's commanders clearly exceeded their orders pursuant to an act of Congress.

(5) To summarize, the Barbary conflicts set a precedent for an expanded Presidential war making power, principally because the 1801 naval action ordered by Jefferson and the 1815 incidents under Madison went virtually unchallenged.

Congress set a precedent for a more flexible mode of authorizing hostilities than the formal declaration of war. But this, too, redounded to the President, because the acts

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[105]Irwin, p. 180.

of February 6, 1802 and March 2, 1815 delegated to him broad discretion in the use of force.

CHAPTER IV

THE BOXER EXPEDITION

Historical Background

After the middle of the 17th century China was ruled by the Manchus, a people of northern Asia, who pierced the Great Wall, conquered China, and established a new dynastic order, the Ch'ing. To consolidate their power the Manchus left the old administrative system virtually intact, and adopted traditional Chinese customs. As a consequence, when confronted with new ideas from the West, the Manchus reacted quite conservatively.[1]

Trade relations with Europe were fairly good, despite inevitable frictions, until the mid-1800's, when the British government took over from the East India Company control of trade with China. Even the propagation of Christianity by missionaries was relatively unhindered for over one hundred years. In the early 18th century, when the Emperor issued anti-Christian edicts, it was in response to missionary threats to his authority.[2]

The Opium War (1840) and the Arrow War (1856) were fought to secure more favorable trading advantages in China for the British government. Afterwards the depen-

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[1]Christopher Martin /pseud./Edwin Palmer Hoyt, The Boxer Rebellion (London: Abelard-Schumen, Ltd., 1968), pp. 19-21.

[2]Chester Tan, The Boxer Catastrophe (New York: Columbia University Press, 1967), pp. 3-7.

dencies ringing the Chinese Empire fell under Western ("barbarian", as the Chinese now called them) control. In the northeast Russia seized huge tracts of land north of the Amur River (1858). In 1862, Portugal had solid control over the southeastern port of Macao. In that same year France occupied Annam to the south (what is now Laos and North Vietnam), and Great Britain annexed Lower Burma in the southwest. (France secured the rest of what it called Indo-China by 1887, and England claimed Upper Burma by 1886.) In the northwest Russia claimed Ili, a large tract of land in Chinese Turkestan (1871), but restored part of it nine years later in exchange for a huge indemnity. In 1879, Japan took the Liuchiu Islands in the East China Sea.[3]

The weakness of the Manchu dynasty at the hands of the Western imperialists encouraged many Chinese to seek internal reforms. A young scholar, Hung Hsiu-ch'uan, influenced by Christian ideas, formed a sect which soon sought the overthrow of the Ch'ing regime. This touched off the T'aip'ing Rebellion (1850), which the Manchus in combination with conservative support took fourteen years to suppress.[4]

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[3]Peter Fleming, The Siege at Peking (New York: Harper & Row Publishers, Inc., 1959)

[4]Martin, pp. 25-26; Tan, p. 9.

In response to the T'aip'ing revolt the Chinese developed a deep suspicion for anything Western--especially Western religious and social ideas, and later, manifestations of its industrialization, such as the railroad and telegraph. The Manchu Court shared this revulsion, but as piece after piece of its empire was hacked off, it realized it would have to modernize sufficiently to withstand the Western onslaught.[5]

In the 1880's a campaign was launched to build railways, open mines, construct dockyards, build naval vessels, establish naval acadamies, reorganize the army, and send students to Europe to study military operations and munitions manufacturing. Ironically, the first great challenge came not from the West, but from the newly modernized Japan.[6]

The Sino-Japanese War of 1895 was a disaster for China. The decisive victory by Japan, which had imperial designs of its own, opened China's eighteen provinces to a fierce competition among the European powers for commercial concessions. Were it not for this competition among the imperialists, China proper might well have been carved up into colonies. The European rivalry created a

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[5]Martin, p. 26.

[6]Tan, p. 9.

balance of power, which, if unbalanced, would result in China's dismemberment.

As it was, China was compelled to grant additional humiliating concessions, and sign conventions giving the European powers, Russia and Japan so-called "spheres of influence." These spheres consisted of whole regions of China in which the Manchus were compelled to give one or another of the Powers exclusive privileges.[7]

Nominally, the Manchu Emperor ruled China. Actually, China was ruled by a combination of the Imperial Court, which was most influential in the central provinces, regional viceroys who had sworn allegience to the Emperor but were fairly independent, and local leaders. And the Court itself was dominated by the crafty old Empress Dowager, aunt of the Emperor, Kuang-hsu.

In the 1890's, once again through the efforts of a young Chinese scholar well versed in Western thought, a new reform movement sprang up. Only this time the external threat to China proper was graver than ever, and the ideas of the reformers found favor with the Emperor. For one hundred days in 1898, decrees were issued commanding various reforms--only to have the Empress Dowager combine with the conservative faction to abort the movement and virtually imprison the Emperor. The Empress then proceeded to

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[7]Ibid., pp. 11-14.

abolish the institutional reforms, and, turning to military reorganization, prepared for armed resistance to foreign encroachments.[8]

Such were the conditions in China at the start of the Boxer rebellion. We turn briefly to Sino-American relations. The United States obtained its first treaty with China after her defeat in the Opium War. The Treaty of Wang Hiya, 1844, opened five Chinese ports to American commerce on a most-favored nation basis.[9] The pact was revised with some concessions favorable to the United States in the Treaty of Tientsin (1858). This agreement opened additional ports to American commerce (Article 14), gave the American Representative the same residence privileges at Peking, the capital, as any other foreign minister (Article 6), and required Chinese officials to defend Americans in China "from all insult or injury of any sort" (Article 11). Finally, the Chinese government agreed to allow foreign Christians and native converts to practice and teach their religion unmolested (Article 29).[10]

In short, United States policy toward China was to pursue whatever commercial advantages arose as a result

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[8]Ibid., pp. 15-32.

[9]Paul H. Clyde, United States Policy Toward China; Diplomatic and Public Documents, 1839-1939 (New York: Russell & Russell, 1964), pp. 13-21.

[10]Ibid., pp. 47-57.

of European oriental policies, but neither to ally itself with any of the European powers, nor to wring concessions by American force of arms.

Three American "interest groups" were particularly concerned with China. First, there were the Christian missionaries. The American missionary movement began in the 1830's, and by 1900 over a fifth of American investments in China consisted of missionary property there. The movement weakened however, as a result of the Depression of 1893, which hurt the churches economically, and because of critical attacks by lay writers. Nevertheless, the public was sympathetic to the victims of isolated antimissionary riots in China.[11]

Second were business interests. Investments in China were relatively small (an estimated two percent of United States foreign trade),[12] but were growing. China purchased almost half of all United States cotton exports, and bought substantial amounts of kerosene and wheat flour as well. Still, China's greatest value to American business was as a potential market for United States goods.[13]

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[11]Marilyn B. Young, The Rhetoric of Empire: American China Policy, 1895-1901 (Cambridge, Mass.: Harvard University Press, 1968), pp. 76-87.

[12]Thomas A. Bailey, A Diplomatic History of the American People, 8th ed. (New York: Appleton-Century-Crofts, 1969), p. 479.

[13]Young, pp. 54-6.

The third "group" with an eye toward China were the navalists. In tune with, or perhaps ahead of the super-nationalistic, expansionist views of the day, these men, led by Captain Alfred Thayer Mahan, envisioned America as a great world power, and necessarily, because of geography, a great naval power. And now (1900), as a result of the Spanish-American War, the United States was an Asian power, with a substantial army and navy fighting a brutal (and increasingly unpopular) war to secure control of the Philippines. (We should note that the Philippine Islands were Spanish possessions until the United States war with Spain--which was declared by Congress.) As early as 1897 some naval elements sought a coaling station for the United States Navy in a Chinese port. Their designs did not have much impact on United States policy toward China, however.[14]

The effect of these interests on United States policy was by no means negligible, however, and the influence of the mercantilists can be seen in the most important policy statement to precede the Boxer outbreak. The statement, first detailed in diplomatic messages to the European powers and Japan in September 1899, became known as the "Open Door Policy." The memos were the brainchild of W.W. Rockhill, an advisor to McKinley's Secretary of State, John Hay. Rockhill was in turn influenced by a British

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[14]Ibid., pp. 5-6, 103-106.

Far East expert, A.E. Hippisley.

While the Open Door was presented to and accepted by the American public as a statement of noble principle--in behalf of China's threatened territorial integrity--it was in fact aimed at serving America's self-interest. The September 1899 notes did not oppose the spheres of influence, they accepted the spheres as facts. The aim was to get each of the European Powers to agree that within their particular sphere, future American commercial rights would not be jeopardized. Only the memo to England revealed concern with "maintaining the integrity of China."[15]

The Powers either interpreted the note's ambiguities to their own advantage, or responded evasively. The Open Door had more of an effect upon the electorate in the Presidential elections of 1900 than it did upon hapless China.

The Boxer Rebellion

Natural disasters often have political repercussions; so it was with the Boxer movement. In the central provinces of Shantung and Chihli (where Peking is), flood and famine took a particularly savage toll on the Chinese population in 1898 and 1899. It is in these districts that the anti-foreign, anti-missionary riots known as the Boxer Rebellion took place.[16]

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[15]Young, p. 131; Clyde, pp. 201-15; Bailey, pp. 479-81.

[16]Tan, pp. 33-34.

It was not simply that the Chinese blamed foreigners for the ravages of nature; rather, the misery attendant to the flood and famine made foreign abuses that much harder to bear. During the Hundred Days reform movement the people were warned about the danger of foreign encroachments in China. And in the northern provinces, where foreign powers held leases, mistreatment of Chinese by foreigners was not uncommon. After all, Germany began the rush to obtain spheres of influence in China by landing troops at the port of Kiaochow, Shantung, and seizing the city by force of arms.[17]

But not only did the foreigners seize Chinese territory forcefully; they also burned villages and shot Chinese at the slightest provocation. Still, most of inland China was visited by no foreign troops. Missionaries, however, did travel inland. They set up schools and hospitals and converted many Chinese to Christianity. But when Chinese converts were prohibited from practicing traditional customs, and when they obtained favorable treatment in legal disputes due to pressure from the clergy, public indignation rose.[18]

It was in this period of great social dislocation that the secret society, I Ho Ch'uan, or "Fists of Right-

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[17]Fleming, p. 29.

[18]Tan, p. 35.

eous Harmony" was formed and flourished. Its avowed aim was to rid China of the foreign devils by killing them off; and for this purpose it practiced martial arts. The "Boxers", as the English called them, touched a responsive chord in the Chinese of the northern provinces, and the movement spread rapidly. Inland foreigners and Chinese Christians now feared for their lives. In 1899, vigorous anti-Boxer measures by the Acting Governor of Shantung suppressed the movement in that district. But in Chihli province, seat of the Court and foreign legations, the story was different.[19]

The Empress Dowager, conservative in her own right, and since the collapse of the reform movement under the influence of reactionary elements, was indecisive. She did not want another T'aip'ing revolt, but she too hated the foreigners; she knew that foreign armies might well invade China using the threat to their nationals as a pretext, yet she could not bring herself to suppress the Boxers.[20]

Apparently there is evidence of an anti-Ch'ing faction among the Boxers. It is argued that initial orders to suppress the movement were aimed at this group, that this element was eliminated, and that later pacifying decrees were part of a dynastic plan to use the Boxers

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[19]Ibid., pp. 49-51.

[20]Ibid., pp. 56-70.

against the foreigners.[21] Whatever the case may be, the Boxers went wild in Chihli province in 1900.

Fearing that the Chinese government was either unable or unwilling to quell the disturbances, the foreign ministers in Peking began to urge their own governments to act. As early as March 9, 1900, the United States Minister to China, Edwin Conger, telegraphed Secretary of State Hay advising a "naval demonstration by war vessels of each Government...in North China waters" should the situation not improve.[22]

Desirous of protecting American citizens, but not wishing to be part of an allied threat to China, Secretary Hay replied six days later as follows.

> Navy Department will detail ship for independent protection American citizens and interests in China. Commander will communicate with you, probably from Taku.[23]

Taku was on the China coast, Peking about ninety miles inland. An American ship arrived at Taku on April 7, 1900, but left at the end of the month telling Minister Conger to communicate with Rear-Admiral Louis Kempff, aboard the U.S.S. Newark, commander of the American fleet

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[21]Young, p. 144.

[22]U.S., Department of State, Papers Relating to the Foreign Relations of the United States, 1900 (Washington: Government Printing Office, 1902), p. 102.

[23]Ibid., p. 110.

north of Hongkong.[24]

When the situation did not improve Conger requested a warship and Kempff arrived at Taku aboard the Newark in late May. Before May ended the foreign ministers requested legation guards; the Chinese foreign office agreed to thirty guards per ministry, but the growing foreign fleet off Taku dispatched 340 men for six legations. Kempff sent fifty marines.[25]

In early June 1900, Conger wired Hay that the ministers and their families along with the many Chinese converts who had rushed to Peking might be beseiged by the Boxers with the possibility of rail and telegraph lines being cut off. This proved an accurate prediction.[26]

On June 10, Kempff contributed about one hundred marines to a 2000-man force commanded by British Admiral Seymour headed to Peking (by rail) to relieve the legations. They never arrived. Half-way to Peking strong resistance from Boxers compelled them to retreat. Their journey and the Boxer victory was catalytic; pandemonium set in all along the railroad and Boxers rushed into the Forbidden City of Peking.

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[24]Ibid., pp. 119-120.

[25]Tan, pp. 53-54.

[26]U.S. Foreign Relations, 1900, p. 141.

China now moved toward war, carried along by the rush of events. The Imperial Court issued decrees to the Chinese Army to stop the Seymour expedition and prevent any further troop landings. Compelled to choose between suppression of the Boxers and, in effect, uniting with them against the foreigners, the Throne had chosen the latter course.[27]

On June 16, the Court again ordered the Army to resist foreign encroachments, and called for the recruitment of young Boxers.[28] Meanwhile, the naval commanders off Taku, now out of touch with Seymour (Boxers had cut the telegraph lines), prepared an ultimatum calling for the Chinese to surrender the forts guarding the mouth of the Pei-Ho River, the water-route to Peking. Admiral Kempff refused to sign or to participate in the bombardment that followed: the United States did not consider itself at war with China.[29]

After the shelling began, an old American gunboat, the U.S.S. Monocacy, was fired on, probably by accident; it headed upriver without returning fire. But now that hostilities had ensued Kempff changed his mind about American involvement. The Secretary of the Navy received the following wire from Kempff on June 20.

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[27]Tan, pp. 70, 74.

[28]Ibid., p. 72.

[29]Young, p. 150.

> Monocacy fired on by Taku forts; no warning. Did not join in protocol demanding temporary possession of forts, as this was, in my judgment, not required at that time. Making common cause with foreign forces for general protection. Three hundred American troops ashore now; entirely inadequate...State of war practically exists.[30]

The Administration had already decided on its course of action. After June 11 nothing more had been heard from Minister Conger; the legations were, in fact, completely isolated and would not be heard from again until mid-July. On June 16, General MacArthur was ordered to send an infantry regiment from the Philippines, where he was conducting military operations, to Taku, China. And on the 22nd, over his protests, he was told to send another regiment.[31]

In Peking, the Empress Dowager had decided upon her course of action as well. Enraged by a newly received set of four demands which would have meant her virtual surrender, and encouraged by early favorable military reports from Taku, an edict declaring war against the Powers was issued, June 21. (The "Demand of Four Points" was likely forged by one of the reactionaries to goad the Empress

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[30]U.S., Adjutant-General's Office, Correspondence relating to the War with Spain and conditions growing out of the same, including the insurrection in the Philippine islands and the China relief expedition, between the adjutant-general of the army and military commanders in the United States, Cuba, Porto Rico, China, and the Philippine islands, from April 15, 1898, to July 30, 1902. 2 vols. (Washington: Government Printing Office, 1902), I:9.

[31]Ibid., 1:412.

into war; the military report was overly optimistic.) In addition, the Boxers were to be organized to fight against the foreigners.[32]

The McKinley administration was in a difficult position. The Congress was not in session. If it joined in concerted military action the United States might end up in a war with China of unpredictable dimensions. The anti-imperialists, who were sniping at the Republicans for America's sordid involvement in the Philippines, would surely make a war in China an issue in the upcoming elections. On the other hand, if the United States did nothing while its citizens and a couple of thousand Chinese converts were massacred in Peking, the public would be outraged.

That Chinese declaration of war, noted above, was for domestic purposes only; neither the United States nor any other country was told that China considered herself at war. Diplomatic relations between the United States and China were maintained throughout the troubled period. But after the fall of the forts at Taku, the foreign troop build-up and the hostilities continued. Several hundred United States soldiers participated in the battle of Tientsin, largest city between Peking and the coast, and just west of several foreign settlements now menaced by Boxers.

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[32]Tan, pp. 73-75, 93-94.

On July 1 news spread that Baron von Ketteler, the German minister who was among the beseiged at Peking, was murdered by a Chinese soldier. Rumor had it that all the ministers had been or would be killed. Fearing China's total dismemberment in reprisal, the viceroys of the central and southern Chinese provinces promised to keep the peace in their areas. One magistrate issued a personal appeal to McKinley, urging the United States to take the lead in restraining the Powers. After an emergency Cabinet meeting Secretary Hay issued the July 3 circular.[33]

In this memo to the European Powers and Japan, the United States reaffirmed its desire to be at "peace with the Chinese nation," but noted that Peking was in a condition of "virtual anarchy." The note stated American intentions to work with the Powers to open communication to Peking, to protect American lives, property and interests, and to keep the disorders from spreading to other parts of China. It concluded by declaring that United States policy

> is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.[34]

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[33]Young, pp. 161-162.

[34]U.S. Foreign Relations, 1900, p. 299.

Upon the direction of the President, no express renunciation of American territorial desires in China was included in the circular. This may have reflected naval desires for a coaling station on the Chinese coast.[35]

Four days later, on July 7, General MacArthur was ordered to dispatch additional American troops from the Philippines to Taku. General Adna Chaffee was appointed commander of all American land forces in China. While General Chaffee was sailing to China, two American infantry battalions joined an international force of about 5000 in capturing Tientsin on July 13. A few days later the Chinese government declared a truce, and Minister Conger was heard from again for the first time in over a month.[36]

On July 20, four days after it was sent, Secretary Hay received the following telegram from Conger. "For one month," the Minister declared,

> we have been besieged in British legation under continued shot and shell from Chinese troops. Quick relief only can prevent general massacre.[37]

Now that Tientsin had fallen (July 13), and there was evidence that the ministers still lived another international relief expedition was formed. On August 3, the allied

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[35]Margaret Leech, In the Days of McKinley (New York: Harper & Bros., 1959), p. 522.

[36]Young, p. 166; Leech, pp. 520-521; Tan, p. 102.

[37]U.S. Foreign Relations, 1900, p. 156.

commanders at Taku, including General Chaffee, planned an advance on the Imperial city. Foreign troops in China now numbered about twenty thousand; around one-fourth of these were American.[38]

The allies were never certain about the number of troops necessary for a successful expedition; after all, since the bombing of the Taku forts they had to fight the regular Chinese Imperial Army as well as the Boxers. Although estimates vary, approximately sixteen thousand troops left Tientsin for Peking on August 4, 1900. Half of the expeditionary force consisted of Japanese soldiers. There were 2,500 Americans under General Chaffee.[39]

The Relief Expedition marched northwest along the banks of the Pei-Ho River toward Peking, meeting stiff resistance along the way. On August 14, the force arrived at Peking, and after a skirmish the legations were relieved. It was considered a miracle that the victims of the two-month seige were still alive. (President McKinley later

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[38]Fritz Grob, The Relativity of War and Peace (New Haven: Yale University Press, 1949), pp. 67-68.

[39]Colonel Richard E. Dupuy and Major General William H. Baumer, The Little Wars of the United States (New York: Hawthorne Books, Inc., 1968), pp. 115-116; U.S., Department of War, Arrangement of the Annual Reports of the War Department for the year ending June 30, 1900, vol. 1: Report of Secretary of War and all other reports except those of Chief of Engineering and Chief of Ordinant (Washington: Government Printing Office, 1900), p. 12.

reported to Congress that sixty-five of the defenders were killed, 135 wounded, and seven children died of disease.[40] One historian has suggested that one of the Chinese officials intervened on the ministers' behalf.[41]

The Empress Dowager hurriedly moved her Court westward, as foreign troops rampaged throughout the Forbidden City. As in Tientsin before it, Peking was subjected to rampant looting, burning and atrocities of all sorts at the hands of the foreign troops. Thus was the relief of the legations tarnished.

The Administration now faced the dilemma of what to do next. Europe, and Germany in particular, was calling for the punishment of the Boxers and their supporters in the Manchu government. (Indeed, scores of punitary expeditions in China were conducted by Europeans well after Sino-European negotiations were begun in October 1900.) Punishment of the Boxers could well be the pretext for more depredations against China and an end to both Chinese integrity and the Open Door.

On the other hand, MacArthur needed more troops in the Philippines, and the anti-imperialists would surely make political capital of a more protracted involvement in China. Privately, Secretary of State Hay summed up the

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[40] U.S. Foreign Relations, 1900, p. xii.

[41] Tan, pp. 112-15.

American situation: "We do not want to rob China ourselves, and our public opinion will not permit us to interfere, with an army, to prevent others from robbing her."[42]

Without making any declarations of policy, American troops were gradually withdrawn from Peking to Tientsin. Enough remained in China for the United States to have a bargaining chip in the negotiations. The United States managed to restrain some of the harsher demands for retribution offered in the talks, the United States Navy never did get its coaling station, and McKinley was re-elected President.

The China Relief Expedition and the Constitution

The Congress had adjourned on June 7, 1900, just before American military personnel were dispatched to China. Congress was never convened in special session, nor was there any suggestion that it be convened. By the time the second session of the Fifty-Sixth Congress had begun, December 3, 1900, the United States had only a token force in China.

The Expedition was successful in that casualties were light, the beseiged Americans were rescued, and a more extensive Asian conflict was avoided. All this may

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[42]Quoted in Young, p. 186.

serve to explain the lack of Congressional response to President McKinley's detailed account of the intervention in China in his opening day Message of December 3, 1900.[43]

American military operations in China were the subject of court consideration in Hamilton v. McClaughry, Warden. Hamilton was stationed in China in December, 1900, when he was convicted by a court-martial convened in Peking for killing a fellow soldier. The Fifty-Eighth Article of War called for punishment by such tribunals for murder "/i/n time of war." Hamilton appealed on the ground that the court-martial had no jurisdiction because the United States was not at war in China at the time of the act.[44]

The Federal court ruled against Hamilton. Judge Pollock, who wrote the decision, declared that "the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby." By "political department," the judge evidently meant Congress, for he notes that the political department never formally declared war against China. Moreover, he concluded that Congress recognized a "condition of war" when it raised the pay of the troops in China to that

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[43]34 Cong. Rec. 2-13ff.

[44]136 F. 449 (C.C. Kan. 1905).

received in war-time.[45]

The Court relied upon Vattel's definition of war, cited in the Prize Cases (1862), as "that state in which a nation prosecutes its right by force." Pollock reasoned that since a nation has the right to protect its citizens, especially its accredited representatives, abroad, the United States government could legitimately, and indeed did, prosecute its right in China. Thus, Hamilton's act was committed in the time of war because the United States was pursuing its right as a sovereign state to protect its citizens abroad by force of arms.[46]

To summarize the reasoning of the federal court: (1) a war exists when the nation pursues its rights in international law by force: (2) Congress must determine that a condition of war exists if a court is to take judicial cognizance of it; (3) a formal declaration of war is not necessary to constitute such a determination; and (4) Congress may determine that a condition of war exists well after the war has begun.

What inferences may be drawn from the above with regard to Presidential war power? It would seem that while Congress may make the political determination that the United States is at war, it need not make such a determina-

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[45]136 F. 449, 451.

[46]Ibid., p. 449.

tion before or during the outbreak of hostilities. A pay raise for the troops long after the fighting has died down will suffice. What the court leaves tantalizingly unanswered is whether or not the President may legitimately prosecute the nation's rights by force (i.e., initiate and conduct a war) without the prior consent of Congress. And if so, under what circumstances?

For one answer to these questions, perhaps the answer insofar as the facts of the Chinese intervention are concerned, one must turn to another episode some half century earlier: the American bombardment of Greytown, Nicaragua. As a result of this incident a Federal court decided the case of Durand v. Hollins.[47]

The discussion in the Hamilton case of the duty of the state to protect its citizens so reminds one of the opinion in Durand v. Hollins, that it is hard to believe that the latter was not cited as a precedent.[48]

The importance of the Durand case and the events from which it issued justify the exploration of both in some detail. Hollins, a United States naval commander, bombarded and razed by fire the town of Greytown, Nicaragua, July 13, 1854. The underlying cause was the Anglo-American

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[47]8 F. Cas. 111 (No. 4, 186) (C.C.S.D.N.Y. 1860).

[48]Compare 136 F. 449, 450 with 8 F. Cas. 111, 112.

rivalry in Central America over the territory where a prospective inter-oceanic canal was to be built. The immediate cause was the avaricious conflict between the merchants of Greytown and the American-owned private company in the profitable business of transporting people across Nicaragua on their way to California.[49]

While the United States and England agreed in the Clayton-Bulwer Treaty (1850) to renounce exclusive control over the canal expected to be built in Nicaragua, sovereignty over the coastal region at the Port of San Juan, where the canal would meet the Atlantic, remained in doubt. The United States considered Nicaragua, from whom an agreement concerning construction of the canal by an American firm was obtained (1849), as rightful sovereign. Great Britain reasoned that all of Nicaragua's Atlantic coast was part of the protectorate it had established over the Mosquito Indians (1847). By 1848, England had forcefully ousted the Nicaraguan officials from the port town of San Juan, replaced them with the Mosquito functionaries, and renamed the place Greytown.

The international rivalry took on more commercial overtones after 1848 when gold was discovered in California. Now it became profitable to transport fortune-seekers across Central America via Nicaragua's rivers and lakes and

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[49]The following account is based upon: David L. Folkman, The Nicaragua Route (Salt Lake City, Utah: University of Utah Press, 1972), pp. 13-21, 59-68.

on to the American west coast by steamer.

Soon an American-owned transport company was operating successfully out of Point Arenas, across San Juan harbor from Greytown. The location proved critical, because as a result, Greytown merchants did not get to deal with the travellers to and from California. Friction between the Greytown authorities representing the merchants there and the transport company steadily mounted in the 1850's.

The desperate Greytowners, who declared themselves an independent city in 1852, first tried to cajole, then to coerce the transport company to conduct its operations in a manner more profitable to Greytown. In 1853, after some of the newly constructed transit company buildings on Point Arenas were demolished by Greytowners and the rest were threatened with destruction, the U.S.S. Cyane, Hollins commanding, was dispatched to Nicaragua. A small party of marines was landed to protect the business; the Greytowners backed down and the Cyane and marines soon departed.

On April 14, 1853, the Navy Department took the opportunity to inform Hollins that his action to protect the transit company had been founded upon the rights of American citizens interested in the business, the charter of which had been granted by the government of Nicaragua. San Juan, or Greytown, the memo went on, is considered part of Nicaragua; the United States recognizes no other

government there.[50]

A year later, 1854, the conflict between Greytown and the company resumed. In March, 1854, the company refused to move its operations from Point Arenas to Greytown. In May, company property was stolen and Greytown officials refused to return it. That same month, an American steamer captain shot and killed a native in a dispute over a ship collision. The United States Minister to Central America, Solon Borland, interceded on the captain's behalf and prevented his arrest by brandishing a rifle. Later that day, a group of Greytowners tried to arrest Borland; someone tossed a broken bottle and the Minister's face was cut.

Borland managed to return to Point Arenas the next day. He hired fifty men to protect company property there, and boarded a steamer for the United States. Greytown meanwhile organized a militia for its defense.

On June 10, 1854, the Navy Department gave Hollins the following orders. He was to return to Greytown, "in pursuance of the wishes of the President," because American-owned property (i.e., transport company property) was "unlawfully detained," Minister Borland had been "treated with rudeness and disrespect," and "further outrages" were feared. "Now, it is very desirable," Hollins

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[50]U.S., Congress, Senate, S. Exec. Doc. 8, 33d Cong., 1st sess., 1853-1854, pp. 7-9.

was told,

> that these people should be taught that the United States will not tolerate these outrages, and that they have the power and the determination to check them. It is, however, very much hoped that you can effect the purposes of your visit without a resort to violence and destruction of property and loss of life.51

The Cyane arrived in early July, 1854. Demands were presented to Greytown for $24,000 in reparations, an apology to Borland, and assurances of future good behavior. When the demands were not met, Hollins issued an ultimatum warning that the town would be bombarded. The next day, July 13, the shelling began. Later that day, when all the residents had withdrawn, marines burned Greytown to the ground. No one was killed.

President Pierce was criticized for exceeding his war powers, and Congress overwhelmingly approved a request for a full report on the Greytown affair. The State Department never disavowed the action at Greytown; President Pierce even defended it in his Message to Congress of December 4, 1854. Overall, repugnance at the harshness of the bombardment, and concern over possible excesses of Presidential authority, were balanced by a satisfaction that the Monroe Doctrine had been reaffirmed against British encroachments.

Such was the background to the federal case that

51U.S., Congress, Senate, S. Exec. Doc. 85, 33d Cong., 1st sess., 1853-1854, p. 21.

arose when one Durand, who owned property in Greytown, sued Hollins for damages sustained during the bombardment. In his defense, Hollins argued that he was bound to obey the orders of the President and the Secretary of the Navy. Supreme Court Justice Nelson, riding the circuit, ruled in Hollins' favor.

Nelson reasoned that as chief executive, the President had full power to protect "by negotiation or...force" citizens and their property abroad. Furthermore, the decision to undertake such an "interposition" abroad must "rest in the discretion of the president." As to the specifics of the Greytown affair, whether or not it was the "duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community..., was a public political question...which belonged to the executive to determine."[52]

Arthur M. Schlesinger has criticized Nelson's decision on the ground that the bombardment of Greytown was more a "calculated retaliation" than an "emergency intervention."[53] The facts bear out Schlesinger's contention. The same historian also points out that the President never "specifically ordered" the bombing, and that the action in question was not directed at a "sovereign

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[52]Durand v. Hollins, 8 F. Cas. at 111-112 (No. 4, 186) (C.C.S.D.N.Y. 1860).

[53]Arthur M. Schlesinger Jr., The Imperial Presidency (Boston: Houghton Mifflin Co., 1973), p. 56.

state."[54] The first point is only true in the technical sense that Pierce did not explicitly sign Hollins' orders. This is irrelevant, however, since the Secretary of the Navy, an executive officer responsible to the President did sign them; and the orders were issued, to use the phraseology of the memo itself, "in pursuance of the wishes of the President."[55]

While Justice Nelson spoke of an unqualified Presidential right (nay, "duty") to "interpose...abroad" to protect American lives and property, the Durand case did involve a "marauding community" as opposed to a sovereign state. Thus, the implication that Presidential war-power resting upon Durand v. Hollins rests upon narrower grounds than the language of the case suggests, may be warranted. Taken at its narrowest, Durand establishes as a Presidential prerogative the authority to intervene to protect the lives or property of American citizens abroad threatened by a marauding group or community.

Let us end our long discursus into the Greytown affair by noting the relevance of the holding in Durand v. Hollins to the United States intervention in China in 1900. The United States decision to intervene in China in the summer of 1900 was solely an executive decision; Con-

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[54]Ibid.

[55]U.S., Congress, Senate, S. Exec. Doc. 85, 33d Cong., 1st sess., 1853-1854, p. 21.

gress was not in session, nor was it called into special session. Over five thousand troops were dispatched to China, half of which actually fought. There were plans to send in thousands more if needed. Fighting took place against Chinese government troops as well as Boxer "irregulars"--many of whom were led by regular army officers under orders from the Empress. Although diplomatic relations were never broken, and war was never declared, the United States and China were, de facto, at war.

Although not the only motive, and perhaps not even the paramount motive, the relief of the beseiged American legation in Peking was a central aim of the United States policy. Thus, the Durand rule, that the President may interpose at his discretion to protect American citizens abroad threatened by a "marauding community", would seem apt in this case.

The China intervention is complicated by two factors. First, there were other motives. The United States did not act simply to protect its citizens in China. There was concern lest China be carved up and the United States denied trading privileges. There was also concern for the missionary movement. Finally, there were even territorial designs on China; the navalists wanted a coaling station. The Chinese intervention was not solely to protect Americans abroad.

Secondly, the United States fought Chinese government troops as well as Boxers organized by the Chinese government. Thus, what began as an executive interposition against an irresponsible and marauding community--which the Boxers surely were before they were organized and given official support--ended up as an undeclared war against a sovereign state. (Although, strange as it may seem, the American military presence in China served China's interests: it was a welcome counterpoise to the European, Russian and Japanese powers, who sought to dismember her.)

In short, the Chinese intervention lies on the frontier of Presidential war power, in that no-man's land between the executive authority to protect citizens abroad and the Congressional authority to declare war.

One other facet of the Chinese intervention needs to be discussed. We have considered it so far as an example of intervention for the protection of American citizens abroad. But it might be pointed out that the United States did not fight against Chinese government troops or government-organized Boxers until after the old American gunboat, the Monocacy, was fired upon.

Might it not be argued that the shelling of the Monocacy was an act of war against which the President might justifiably order a response? The American fleet commander, Kempff, seemed to suggest this possibility. The fact is that the Monocacy's commander did not view the

stray hit as provocative; he never returned fire. It was Kempff's idea to use the incident as a casus belli.[56]

The McKinley administration never took up Kempff's suggestion, because it never considered itself at war with China. The July 3, 1900 Circular announced that, "We adhere to the policy...of peace with the Chinese nation." And in his December 3, 1900 Message to Congress, President McKinley reaffirmed the July 3 Note, and added, "Our declared aims involved no war against the Chinese nation."[57]

The Monocacy episode was incidental as far as Washington was concerned. It was neither the motivation nor the pretext for the subsequent hostilities in China.

Conclusion

The Boxer Expedition is the paradigm case of the Commander in Chief introducing armed forces into hostilities in order to protect Americans abroad. Congress was not consulted, nor did it give after-the-fact approval. The success of the mission insured against public or legislative criticism. The President successfully asserted his power to deploy forces to protect United States citizens overseas without authority in treaty or law.

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[56]Young, pp. 151-152.

[57]U.S. Foreign Relations, 1900, pp. 299, xiv.

CHAPTER V

UNITED STATES INTERVENTIONS IN MEXICO 1914-1917

Historical Background

When Woodrow Wilson ordered United States marines to land and occupy Vera Cruz in 1914, he added to an already long record of American military operations in Mexico. Most significant was the unfortunate War of 1846-1848, which raises some questions about Presidential war-power in its own right.

The focus of the dispute in 1846 was Texas, which had been Mexico's rebellious northernmost province. Mexico had in fact claimed as hers the entire American southwest, but she had never established control over most of the territory. Her fatal mistake was to encourage American settlers to come to east Texas in the 1820's and 1830's. In 1835, Texas rebelled and declared itself independent, and although Santa Anna's army suffered a setback in 1836, Mexico refused to recognize an autonomous Lone Star State.[1]

The independent Texans promptly claimed wildly inflated boundaries. Whereas the Nueces River had served as the province's southern and western border, Texas now

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[1]Thomas A. Bailey, A Diplomatic History of the American People, 8th ed. (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1969), pp. 237-48.

claimed all the land up to the Rio Grande. Mexico ignored this pronunciamento, reasoning that all of this territory still belonged to her.

Meanwhile, the United States did not sit idly by. Gripped by that land lust known as "Manifest Destiny," Americans dreamed of an empire extending to the Pacific, and including Oregon and Texas, both of which were in dispute. There was, however, fierce opposition to the annexation of Texas by abolitionists who feared the addition of slave-holding states to the United States.

As a result, annexation was postponed until early 1845, when it was approved by a joint Congressional resolution. (There was no precedent for annexing territory by such method. A year earlier, the Senate had refused to grant the necessary two-thirds approval to an annexation treaty with Texas.)

Mexico protested the annexation, and as she had vowed, broke off diplomatic relations with the United States. The new American President, James K. Polk, who had campaigned as an expansionist, immediately offered to drop long-standing American claims against Mexico, for which the Latin nation was long in arrears, if she would sell to the United States all the land west of Texas. This only served to fan the flames of Mexican nationalism, and so Mexico refused even to negotiate.

Polk promptly ordered General Zachary Taylor, who had been stationed on the southern bank of the Neuces River, to move his troops south across the disputed territory down to the Rio Grande. The orders were given January 13, 1846, but because of delays, Taylor did not complete the trek until late March. Warned by the Mexican army to retreat to the Nueces, Taylor refused, and even built a fort to blockade the Rio Grande.[2]

On April 25, a column of American soldiers was ambushed by Mexican troops who had crossed the Rio Grande for that purpose; eleven Americans were killed. When Polk received the news he had already begun work on a war message to Congress; now he would have a pretext.

On May 11, 1846, Polk told the legislature, somewhat disingenuously, that "Mexico has passed the boundary of the United States, has invaded our territory, and shed American blood on the American soil." The next day, a Congress united in indignation over the American losses, resolved that "by the act of the Republic of Mexico, a state of war exists between that government and the United States."[3]

Many in Congress came to regret that vote. It was not long before opposition Whigs (like freshman Congressman Abraham Lincoln) and abolitionists were condemning "Polk's

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[2]Robert Leckie, The Wars of America (New York: Harper & Row, Publishers, Inc., 1968), p. 326.

[3]Ibid., p. 327.

War." At one point, in early 1848, the House of Representatives even declared the war "unnecessarily and unconstitutionally begun by the President." But when the Senate refused to go along, the House rescinded the amendment.[4]

Although the Constitutional forms were observed, there is little question but that the President initiated the Mexican War. This is a paradigm case of the policy-making initiative, in spite of the Constitution, having passed into the hands of the President.

As a result of the war, the Mexican clique that had promoted the conflict lost prestige and splintered, thus leaving Mexico divided into two opposing factions of roughly equal power. Two decades of civil strife followed. During this period, American loss of life and property in Mexico or near its border was especially severe. In December, 1859, President Buchanan proposed that Congress authorize military intervention in Mexico as a means of "obtaining indemnity for the past and security for the future."[5]

Ironically, the territory gained as a result of the Mexican War moved the United States closer to its Civil War as it found itself unable to resolve the dispute over slavery in the newly acquired land. While the United States was

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[4]U. S., Congress, Congressional Globe, 30th Cong., 1st Sess., January 3, 1848, p. 95.

[5]Quoted in Bailey, p. 349.

distracted, the French army invaded Mexico and set up Maximilian of Hapsburg as the unlikely Emperor of Mexico. The United States resented this monarchical challenge to the Monroe Doctrine, and doubly so because Maximilian sympathized with the South during the Civil War.

After his defeat of the Confederacy, General Grant ordered General Sheridan and 50,000 troops to the Texas-Mexican border, and even sent General Schofield south of the border to form an army out of former Union and Confederate soldiers.[6]

When Napolean III withdrew French forces in 1867, Maximilian was easily toppled, leaving impoverished Mexico in a state of anarchy. Bandits freely robbed and killed without much regard for international boundary lines.

In 1877, President Hayes' administration issued an order authorizing United States troops to chase marauders across the border and pursue them in Mexico. Mexico strenuously objected, and the order was rescinded in 1880. Nevertheless, between 1875 and 1885, American troops crossed the Mexican border about 20 times.[7]

The border crossings and the anarchy ended when Mexico turned to a strongmen, Porfirio Díaz. Díaz ruled Mexico without interruption from 1884 to 1911, when he was over-

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[6]This occurred 1865-66. Bailey, pp. 351-55.

[7]Ibid., pp. 393-393.

thrown. Díaz gave Mexico a long period of internal and external peace, but his científico doctrine, while encouraging foreign development of Mexico's resources and creating a middle class, did little to allevaite the destitution of the mass of Indians and Mestizos.

Startlingly, when a middle class reformer, Francicso I. Madero, challenged the old despot in 1911, the regime collapsed like a house of cards. During the Díaz years, the United States had developed a considerable commercial interest in Mexico; investments were estimated at about a billion dollars. In addition, approximately 40,000 American nationals resided in the Latin republic.[8]

It is interesting that the "Dollar Diplomacy" administration of William H. Taft merely looked on as the challenges to the Díaz regime grew bolder. Taft did send troops to the border as a warning to both Porfiristas and Maderistas that he intended to safeguard American interests. But when Díaz fell, most of the troops were withdrawn.

On the other hand, the American ambassador to Mexico, Henry Lane Wilson (no relation to Woodrow), repeatedly urged more aggressive United States action, and when more vigorous instructions were not forthcoming he acted on his own. Ambassador Wilson's activities were long a source of embarrass-

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[8]Arthur S. Link, Wilson: The New Freedom (Princeton, N. J.: Princeton University Press, 1968), p. 349.

ment to the United States.

After Madero was formally elected President of Mexico in November, 1911, and the United States afforded recognition, Ambassador Wilson did everything he could to undermine him. Madero's coalition gradually fell apart, and Wilson's diplomatic dispatches always emphasized his weakness and the strength of his enemies. While a coup d'état was under way in the capital in February, 1913, Wilson, still acting without instructions, threatened to land marines if American lives were not safeguarded. In addition, he persuaded the British and German ministers to join him in urging Madero to resign.

Finally, Wilson helped arrange the "truce" between the rebels and General Victoriano Huerta, who had been selected by Madero to crush the revolt. It soon became apparent that Huerta, with Wilson's support, had betrayed Madero. Huerta presented himself as the preserver of order and civil peace. He announced that he would serve as Provisional President until the next elections. Madero and his Vice President were arrested and later found shot, although Huerta always denied any responsibility.[9]

Ambassador Wilson urged the Taft administration, in its waning days, to grant de jure recognition to Huerta, but

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[9]Howard F. Cline, The United States and Mexico (Cambridge: Harvard University Press, 1961), pp. 113-34; P. Edward Haley, Revolution and Intervention: The Diplomacy of Taft and Wilson with Mexico, 1910-1917 (Cambridge, Mass.: M.I.T. Press, 1970), pp. 11-73.

this was withheld. Such a decision would be left to the incoming Democratic administration of Woodrow Wilson. The new President, however, had no intention of recognizing Huerta. He was morally outraged by the betrayal of what he considered popular, constitutional government. President Wilson was determined to restore rightful rule to the Mexican masses. His contempt for Huerta's "government of butchers" was comparable to, though more noble than, Ambassador Wilson's loathing of Madero.

II. United States Interventions, 1914-1917

Huerta tried to establish a military dictatorship in the face of both internal and external opposition. At home, Madero had become a martyr, and many Mexicans rallied to the cause of the Constitution for which he had died.

An unstable anti-Huerta coalition formed, with Venustiano Carranza, governor of Coahuila province as "First Chief" of the "Constitutionalist Army." This coalition had its power base in the less populous north, west and south of Mexico. Guerrilla chiefs like Emiliano Zapata and Francisco "Pancho" Villa swore nominal allegiance to Carranza. But these rural guerrillas, a cross between romantic revolutionary terrorists and outright bandits, were united with Carranza only by their common desire to oust Huerta, the "Usurper."

A more potent source of Carranza's power was the support, while he had it, of the well-organized northwestern army led by Alvaro Obregón.[10]

From abroad Huerta would face consistent pressure from, and ultimately intervention by, the Wilson administration. The last thing President Wilson wanted was a war with Mexico; but the first thing he wanted was a restoration of constitutional government. He was tempted by a plan offered by American commercial interests. This plan called for 1., recognition of the Provisional President in exchange for his promise to hold elections, and 2., mediation by Ambassador Wilson between the Constitutionalists and Huerta.

Wilson was reluctant to act without more information about affairs in Mexico. He also began to mistrust Ambassador Wilson, who was now being linked by the press to Madero's overthrow.[11]

As a result, the President, who took personal charge of United States policy toward Mexico, dispatched a series of special emissaries south of the border. The first of these, sent in late May, 1913, was the President's friend, journalist William Bayard Hale. Hale's reports from Mexico City confirmed Wilson's negative opinions of both Huerta and Am-

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[10]Cline, pp. 136-38.

[11]Link, Wilson: The New Freedom, pp. 350-53.

bassador H. L. Wilson. Following Hale's reports, the ambassador was dismissed in July, 1913.[12]

A second observer, Reginald Del Valle, was sent to northern and western Mexico to report on the Constitutionalists. But Del Valle was so inept that he was quickly recalled.[13]

Without consulting any of the Mexican factions, President Wilson next sent former Governor John Lind of Minnesota to present the United States plan for settlement of Mexico's problems. Lind, who was anti-Catholic, spoke no Spanish and had no diplomatic experience, left in August, 1913.

He was instructed to seek an immediate cease-fire, early and free elections in which Huerta would not be a candidate, and the agreement of all parties to abide by the election results. The Huerta regime resented Lind's presence as an unwarranted intrusion in Mexican internal affairs. Lind threatened that the United States would sell arms to the Constitutionalists, and even resort to military intervention. He then offered a "loan" to the de facto government. But the Huertistas remained adamant. The Lind mission was an abysmal failure.[14]

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[12]Ibid., p. 354. Haley, p. 94.

[13]Link, Wilson: The New Freedom, p. 355.

[14]Ibid., pp. 356-60.

During the summer of 1913, the 63rd Congress, to the limited extent that it was concerned with Mexico, divided along partisan lines. Senator Fall, from the border state of New Mexico, led the Republicans in urging more vigorous United States action to protect American lives and property in Mexico. Resolutions were offered whose aim was to encourage arms sales to the Constitutionalist faction, to authorize mediation by the United States and the A.B.C. Powers (Argentina, Brazil and Chile), and even to authorize armed intervention by the United States. These resolutions all died in the Foreign Affairs or Foreign Relations Committees of Congress.[15]

On August 27, 1913, Wilson went before Congress to inform it about the failure of the Lind mission. He explained that although the prospects were not hopeful, peace would come to Mexico only after the establishment of "honest constitutional government." The United States had offered its friendly offices, (i.e., the Lind mission), but they were declined. "We can not," the President added philosophically, "thrust our good offices upon them."[16]

Wilson then urged all Americans to leave Mexico, but warned of United States vigilance in behalf of those who remained. He announced a renewal of the arms embargo in accor-

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[15] 50 Cong. Rec. 2222-36, 3567-71. 2627, 3531, 2907, 3128, 3133, 3384-87 (1913).

[16] Ibid., p. 3803.

dance with a joint Congressional resolution of March 14, 1912, and closed by proclaiming the "moral right" of American policy.[17]

Wilson considered his policy one of "true neutrality": selling arms to neither side while standing ready to mediate between them. But he was actually serving Huerta's interests, because the latter received supplied from Europe via the seaports in his control, while the landlocked Constitutionalists were at a disadvantage. Huerta tried to prolong his advantage by holding out the (false) hope that he would not be a candidate in the upcoming Mexican elections.[18]

But events in Mexico soon led to the abandonment of "true neutrality." Constitutionalist military successes and the open hostility of the Mexican Congress (dominated by Maderistas) led Huerta to disband the parliament and jail over 100 of its deputies in October. Later that month he permitted the seating of a new, pro-Huerta legislature, but voided the Presidential elections for lack of sufficient voter turnout. Huerta declared that he would remain as Provisional President.[19]

With all hope of free elections gone, Wilson decided to do everything he could to unseat the Mexican dictator.

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[17]Ibid., p. 3804.

[18]Link, Wilson: The New Freedom, pp. 361-63; Haley, pp. 101-3.

[19]Cline, p. 147.

Meanwhile Great Britain, who had been supporting Huerta all along in exchange for protection for its much-needed Mexican oil holdings, incurred Wilson's wrath. The day after the arrest of the deputies the new British minister made an ostentatious display of presenting his credentials to the de facto government.

At first Wilson prepared a stinging rebuke of England, accusing her, in effect, of subverting America's Mexican policies. State Department Counselor John Bassett Moore convinced Wilson of the unwisdom of presenting such a diplomatic note, and the President turned instead to more subtle methods. As a result, England agreed to reduce its support for Huerta.[20]

While awaiting J. B. Moore's comments, Wilson presented the gist of his position in his famous Mobile, Alabama address, on October 27, 1913. Thinly disguising his mistrust of England in Mexico, the President warned that foreign commercial interests threatened constitutional liberty in Latin America. The United States, by contrast, will not be guided by expedient material interest, but by morality. Moreover, Wilson vowed, "the United States will never again seek one additional foot of territory by conquest."[21]

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[20]Link, Wilson: The New Freedom, pp. 366-77.

[21]Quoted in Bailey, p. 556; Haley, p. 109; Cline, p. 149.

John Lind remained in Mexico City to bargain unsuccessfully with Huerta. Meanwhile, starting in mid-October, William Bayard Hale began negotiating with Carranza. While threatening possible United States intervention, Hale promised a resumption of arms shipments if the Constitutionalists would agree to a neutral interim government and early elections. Carranza was obstinate; under no circumstances would he negotiate with Huerta, nor would he agree to anything short of the complete overthrow of his regime. By November 15, 1913, both sides had rejected Wilson's peace proposals.[22]

Wilson did not seem to understand that Mexico was in the throes of revolution or, at least, civil war, and that such a conflict could not be resolved by ballot. Furthermore, foreign interference in Mexican affairs, generally associated with foreign investments, of which the United States had the greatest share, was one of the major issues. Whether willing or not, no Mexican leader could maintain his credibility and openly endorse American interference.

But by the new year (1914), Wilson had become less concerned with the obstacles and, rather, obsessed with seeing Huerta's demise.

Meanwhile the military contest in Mexico was see-sawing

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[22]Haley, pp. 111-19.

back and forth. In mid-January the President tried to alter the balance by permitting arms to "slip through" customs and into the hands of the Constitutionalists. And after communicating with a persuasive Carranza agent later in the month, Wilson repealed an earlier arms embargo on February 3, 1914.[23]

Nevertheless, the military stalemate continued, because of differences between Carranza and Villa, and because the Church and propertied elements in Mexico rallied to Huerta. Wilson had told the Congress that his Mexican policy consisted of "watchful waiting;" waiting presumably for Huerta to quit or the Constitutionalists to defeat him militarily.[24]

By April Wilson could wait no longer. A momentary Constitutionalist advantage and a trivial incident formed the backdrop to United States intervention. Congressional Republicans were impatient with the Democratic President's policy --"deadly drifting," they called it--and urged intervention to protect Americans and their interests. They were, if anything, more "hawkish" than the Administration.[25]

Wilson hoped to deprive Huerta of control over the east

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[23]Ibid., pp. 125-29; United States, Department of State, Papers Relating to the Foreign Relations of the United States, 1914 (Washington: Government Printing Office, 1922), pp. 447-448.

[24]Link, Wilson: The New Freedom, p. 392.

[25]See, e.g., 51 Cong. Rec. 3927-29, 3973-76, 4048-50, 4510-28, 5144, 5495-5496 (1914).

coast ports of Mexico, especially the valuable port of Tampico, site of numerous oil refineries. He intended to so weaken Huerta thereby, that a Constitutionalist victory would be inevitable.

The Constitutionalists had attacked Huertista forces at Tampico when an American whaleboat, the U. S. S. Dolphin, flying its flag, docked without permission behind Government lines in order to buy gasoline. Since this area was closed to all but Mexican government personnel, the paymaster and the crew of seven were arrested. This took place on the morning of April 9, 1914.

By that afternoon, the men had been released, and the local commander had apologized. But this did not suit Admiral Mayo, commanding the American naval fleet off Tampico. He demanded a formal apology, punishment of the arresting officer, and the hoisting of the American flag followed by a 21-gun salute. Mayo acted on his own authority.

The next day, Wilson approved Mayo's ultimatum, and the American chargé at Mexico City was instructed to enforce the demands upon the threat of "the gravest consequences."[26]

Huerta was in a bind. If he met the American demands

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[26]United States Foreign Relations, 1914, pp. 448-50; Link, Wilson: The New Freedom, pp. 394-96; Robert E. Quirk, An Affair of Honor: Woodrow Wilson and the Occupation of Vera Cruz (Lexington: University of Kentucky Press, 1962), pp. 19-33.

he would discredit himself for having consented to Mexico's humiliation. If he refused, he faced the prospect of direct American military intervention. Hoping to ride the crest of anti-foreign sentiment certain to follow an overt American interference, Huerta chose the latter course.[27]

Wilson already had his course mapped out. Robert Lansing, a State Department counselor, searched Department files for a precedent to serve as a rationalization for American intervention. Lansing noted the 1854 shelling of Greytown; Nicaragua, and suggested that the President had the authority to use force in order to enforce demands or exact reprisals.[28]

Two other minor and unrelated incidents played into Wilson's hands. On April 11, an American naval mail orderly was mistakenly arrested in Vera Cruz, and an ignorant Mexican censor delayed a diplomatic cable from Mexico City to Washington. Wilson would later present these petty occurrences as part of a general Mexican scheme of effrontery.[29]

On April 14, Wilson ordered a large battleship fleet, troop transports filled with marines, cruisers and destroyers to sail for Tampico. There were no instructions to land

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[27]Quirk, pp. 41, 53.

[28]Ibid., pp. 50-51.

[29]United States Foreign Relations, 1914, pp. 453-55, 465.

the marines. That same day the press was informed.[30]

Historians cannot agree over the mood of the American public in response to this movement toward war. Robert E. Quirk sees "warm and wholehearted support," while Arthur S. Link finds a "tidal wave of denunciation."[31] While the fleet prepared to depart, Wilson called the senior members of the Congressional foreign relations committees to the White House to inform them, on April 15. He told them that unless all demands were met the fleet would be ordered to block the Tampico and Vera Cruz ports through which Huerta received supplies from Europe. He added that Congress would be asked to approve his plans but not to declare war.[32]

Meanwhile, Republicans in the House accused the President of exaggerating the Tampico incident in order to create "an excuse to intervene." They charged Wilson with acting on grounds of "personal prejudice and enmity" for Huerta, while ignoring the depredations against Americans by Constitutionalists in northern Mexico.[33]

After a series of diplomatic exchanges in which Huerta called for a simultaneous salute to both flags, and Wilson

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[30]Ibid., p. 459; Quirk, p. 53; Link, Wilson: The New Freedom, p. 396.

[31]Quirk, pp. 58-59; Link, Wilson: The New Freedom, pp. 403-5.

[32]Link, Wilson, The New Freedom, p. 397.

[33]51 Cong. Rec. 6751-6752 (1914).

refused to compromise, the American President went before Congress on April 20, 1914. At 3 P.M. Wilson solemnly presented the facts of the U.S.S. Dolphin incident to a joint session of Congress. He insisted that the occurrence was neither trivial nor isolated: other events (the arrest of the mail orderly and the delay of the cable) combined with it to form a pattern "of slights and affronts in retaliation" for American refusal to recognize Huerta. "No doubt," Wilson declared,

> I could do what is necessary in the circumstances to enforce respect for our Government without recourse to the Congress, and yet not exceed my constitutional powers as President; but I do not wish to act in a matter possibly of so grave consequence except in close conference and cooperation with both the Senate and House.[34]

This interpretation of Presidential power may have reflected Lansing's research, noted above. It directly preceded Wilson's request for approval to

> use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States . . .[35]

An hour earlier, the Secretary of the Navy instructed the fleet to head to Vera Cruz prepared to land its marines.

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[34] United States Foreign Relations, 1914, p. 476.

[35] Ibid.

Wilson had told Congressional leaders that he hoped to prevent a German arms shipment already en route from reaching Huertistas.[36]

Following Wilson's speech, House Joint Resolution 251 was offered and debate ensued along partisan lines. The Resolution declared,

> That the President of the United States is justified in the employment of armed forces of the United States to enforce the demands made upon Victoriano Huerta for unequivocal amends to the Government of the United States for affronts and indignities committed against this Government by General Huerta and his representatives.[37]

House Democrats called upon the Congress to "sustain the President" in a time of crisis, and insisted that House Joint Resolution 251 was not a declaration of war. The Republicans were less confident about its status and what it might lead to. They urged amending the Resolution by inserting "within the limit of his constitutional powers" after the word "employment." They reasoned that such a modification was necessary "to make sure that this is not a declaration of war."[38]

But this amendment, a weaker substitute resolution, and

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[36]Quirk, pp. 70, 74.

[37]51 Cong. Rec. 6934 (1914).

[38]Ibid., pp. 6934-37, 6943.

an amendment explicitly denying that House Joint Resolution 251 was a declaration of war were all beaten back. Late that day, the Resolution was approved, 337 to 37.[39]

On the evening of the 20th, the Senate received the House-approved measure. But Republican opposition, led by Henry Cabot Lodge of Massachusetts, succeeded in delaying the Resolution until the next day by having it sent to the Senate Foreign Relations Committee. In the meantime, late that evening, President Wilson ordered marines to seize the customshouse at Vera Cruz, thus intercepting the German arms shipment.[40]

On April 21, the Senate Foreign Relations Committee offered House Joint Resolution 251 with the following amendment.

> That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.[41]

In addition, Lodge tried to include a broad preamble, citing the depredations against Americans and the "unrestrained violence and anarchy" in Mexico, as well as the insults to the United States, as the rationale for United States intervention. The Lodge preamble was rejected,

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[39]Ibid., pp. 6939, 6948, 6957.

[40]Quirk, pp. 76-77.

[41]51 Cong. Rec. 6964 (1914).

47-36.[42]

An amendment declaring that "a state of war exists" also suffered defeat, as did a proposal to add the words, "to protect American citizens" to the body of the Resolution. The latter proposal lost by only a three-vote margin.[43]

The Senate then approved the Resolution with the Foreign Relations Committee amendment, by a 72 to 13 vote. The following day, April 22, the House agreed to the upper chamber's version.[44]

During the Senate debate of the 21st, Republican Senator Clapp of Minnesota noted with dismay and resignation that while Congress had the Constitutional authority to declare war, "nevertheless, the power to make war, unfortunately, is in the hands of the President, as has been demonstrated by the activities and events of the last 24 hours."[45] But apparently a vast majority of the Congress as well as the Administration did not agree that war had either begun or been declared.

House Joint Resolution 251 "justified" the President's use of force against Huerta, but disclaimed hostility or any

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[42]Ibid., pp. 6964, 7006.

[43]Ibid., pp. 7004, 7007.

[44]Ibid., pp. 7014, 7076-78; Joint Resolution Justifying the employment by the President of the armed forces of the United States, 38 Stat. 770 (1914).

[45]51 Cong. Rec. 7002 (1914).

intention to make war on Mexico. In an April 22nd dispatch from Secretary of State William Jennings Bryan to various American diplomatic missions, the Secretary gave the Administration's interpretation. "Please note," he said,

> that the word 'justified' is used instead of 'authorized.' This was done to emphasize the fact that the resolution is not a declaration of war but contemplates only the specific redress of a specific indignity.[46]

These words were sincere to the extent that Wilson truly did not want a military conflict with Mexico. But he had underestimated the strength of Mexican nationalism, which revealed itself in the instantaneous outcry by all of Mexico--including the Constitutionalists--against the American intervention. Wilson was aghast to learn that the Mexicans resisted the landing with the result that casualties were suffered by both sides.[47]

Parenthetically, the arms shipment got through to Mexico City anyway. The captain of the German vessel simply delayed for several days, then made his delivery at a port south of Vera Cruz.[48]

Perhaps the unexpected fighting in Mexico, along with Carranza's firm withholding of support--Carranza informed

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[46]United States Foreign Relations, 1914, pp. 482-483.

[47]Link, Wilson: The New Freedom, p. 402.

[48]Quirk, p. 151.

Wilson that the United States "invasion" at Vera Cruz "may indeed drag us into an unequal war"--led the President to restrict American military operations. At any rate, although he sent reinforcements to hold occupied Vera Cruz, he vetoed Army plans to march to Mexico City, and on April 25, 1914, accepted an offer of the A.B.C. powers to mediate.[49]

An important, and perhaps calculated, exception to the nearly universal Mexican condemnation of the United States came from Pancho Villa. Presaging his split with Carranza, Villa told an American agent that the United States "could keep Vera Cruz and hold it so tight that not even water could get in to Huerta" and he would have no objections.[50]

Villa was undoubtedly anticipating Huerta's downfall, and by widening the rift between the United States and Carranza, he hoped to keep the latter from assuming power.

Wilson, meanwhile, tried to use the A.B.C. mediation (which began May 20, 1914, in Niagara Falls, Canada) to get Huerta's agreement to resign, and the Constitutionalists to support the establishment of a reform-minded provisional government acceptable to all parties. Huerta was conciliatory; American control of Vera Cruz and Constitutionalist military advances had fatally weakened him. The Constitu-

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[49]United States Foreign Relations, 1914. p. 484; Link, Wilson: The New Freedom, pp. 401-402.

[50]Special Agent Carothers to the Secretary of State, United States Foreign Relations, 1914, p. 485.

tionalists, on the other hand, smelled victory and adamantly refused to negotiate a settlement of Mexico's internal conflict.

In order to force Carranza's hand, and to prevent a possible clash between the Constitutionalists and American troops on the Mexican border, Wilson embargoed arms sales to the Constitutionalists and withheld recognition of them as belligerents. Nothing positive came of this, however; Huerta resigned in July, 1914, and Carranza occupied the capital the next month.[51]

Washington was jubilant at Huerta's demise. But the Mexican Revolution had only gone through its first phase. Before long Wilson would intervene again, but this time reluctantly.

Carranza was not in Mexico City long before the shaky Constitutionalist coalition fell apart completely, plunging Meixco further into civil war. A confusion of factions emerged, but the basic and irreconcilable split was between Villa and Carranza, with Zapata temporarily allying himself with the former and Obregón siding with the First Chief.[52]

With the conflict between Villa and Carranza now open,

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[51]Link, Wilson: The New Freedom, pp. 407-16; Haley, pp. 139-49.

[52]Henry B. Parkes, A History of Mexico (Boston: Houghton Mifflin Company, 1938), pp. 353-354.

the United States, in November, 1914, withdrew its remaining troops from Vera Cruz.[53] Until the Spring of 1915, control of the capital changed hands a number of times, when, in April, Obregón's forces dealt the Villistas a crushing defeat, marking the start of their retreat to the northernmost provinces of Mexico.[54]

A Pan American Conference had been convened in the summer of 1915 at Wilson's behest to consider what action to take in regard to the chaos in Mexico since Huerta's decline. But by the Fall, Carrancista military strength left the conferees with little choice. In October, 1915, the United States granted de facto recognition to Carranza, and suspended arms exports to all other factions in Mexico.[55]

Wilson would still have liked to control the direction of the Mexican Revolution, but had learned some lessons about the dangers of intervention from Vera Cruz. Moreover, he became increasingly distracted by the war in Europe, and since he was never sympathetic to the American capitalists in Mexico, he did little in response to the murder of an estimated 76 Americans south of the border between 1913 and

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[53] United States Foreign Relations, 1914, pp. 621-622.

[54] Parkes, pp. 353-354.

[55] Haley, pp. 165-82.

1915.[56]

But by year-end, an embittered Pancho Villa, driven north by Obregón, and without hope of regaining power, sought to punish the United States for recognizing and permitting arms sales to Carranza. Villa and his rag-tag "army" promoted border warfare ultimately issuing in another American intervention.[57]

In the United States Congress, the persistent Senator Fall of New Mexico led mounting Republican pressure in that Presidential election year of 1916 for more vigorous protection of American lives and property in Mexico. On January 5, Fall offered a resolution which was approved by the Senate on the following day. (A similar measure did not pass the House, however.) Senate Resolution 42 requested that the President, "if not incompatible with the public interests," transmit to the Senate the following information and documents.

Is there, the Resolution queries, a government in Mexico? Is it recognized by the United States? Who are its leaders? Is the government constitutional? By what means was its recognition brought about? What assurances has this govern-

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[56]United States, Department of State, Papers Relating to the Foreign Relations of the United States, 1916 (Washington: Government Printing Office, 1925), p. 476.

[57]Parkes, p. 356.

ment given regarding protection of American lives and property?; regarding claims for damages to same?; regarding the right to free exercise of religion? What instructions have been issued to American border officials and armed forces concerning such protection? Finally, the Resolution requested a full report on the Vera Cruz occupation and evacuation, and virtually all diplomatic documents of the Wilson administration concerning Mexico.[58]

Before the Wilson administration could respond, Villa realized that he could embarrass both Wilson and Carranza by giving credence to the charges that Americans in Mexico or near her borders were unsafe. On January 10, 1916, Villa halted a train at Santa Ysabel, Mexico, and murdered 16 Americans associated with an American-owned mining company.[59]

In Congress Wilson was sharply criticized for his lack of concern for American citizens in Mexico. Various measures were introduced (all of which ultimately died in committee) authorizing armed intervention for the purpose of providing protection.[60]

The Senatorial debate of January 18 throws some light on contemporary thinking in regard to Presidential war-making

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[58] 53 Cong. Rec. 501, 589-603 (1916).

[59] United States Foreign Relations, 1916, pp. 652-653.

[60] 53 Cong. Rec. 1004, 1060, 1189 (1916).

power. The exchange was sparked by Senator Lippitt's (R. I.) assertion that if he were President he would have immediately sent troops into Mexico to punish the perpetrators of the Santa Ysabel massacre.[61]

Upon being reminded by Senator Stone (Mo.) that the President "has no constitutional right to order an invasion" under such circumstances, Lippitt recalled that the President landed marines at Vera Cruz while the upper chamber was in the midst of debate over the justifying legislation. Lippitt suggested that if the President had the authority to land marines to intercept a cargo of arms, he could also "send American troops over the border."

Stone insisted that to pursue bandits all over Mexico would bring the United States army into conflict with the Mexican government forces and would thus mean war. Stone appealed to Senator Brandegee (Conn.) to give his opinion on the constitutionality of Lippitt's suggestion regarding the dispatch of troops. Brandegee replied that

> it depends . . . entirely upon the extent to which it is done. I think, of course, it goes without saying that the President has no authority to make war against a foreign nation without the consent of Congress. It is exclusively in the control of Congress to declare war and to make peace. But it has been repeatedly held

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[61]Ibid., pp. 1189-92.

> . . . that a mere intrusion to rescue citizens or to protect the property of citizens is not an act of war, and the President has repeatedly and unquestionably exercised such authority by the landing of marines and then retiring after the object has been accomplished.[62]

On February 17, 1916, the White House responded to the Fall Resolution.[63] The President refused on grounds that it was "incompatible with the public interest to transmit to the Senate, at the present time, the voluminous correspondence called for." Secretary of State Lansing (Bryan had resigned in June, 1915), who prepared the response, admitted that the de facto government of Carranza was "military" and not constitutional, that it had promised to protect lives and property and had done a "reasonably adequate" job of it in the areas under its control, but that due to the difficulty of restoring order after years of lawlessness, "sporadic outrages" could be anticipated.[64]

No sooner had interventionist sentiment waned in the Congress when Villa struck again. On March 9, 1916, about 500 to 1,000 Villistas attacked and burned Columbus, New Mexico, killing and wounding several American soldiers and civilians. A small detail of American troops pursued them

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[62]Ibid., p. 1192.

[63]United States Foreign Relations, 1916, pp. 469ff.

[64]Ibid., pp. 470-471.

over the border into Mexico.[65]

The American public was absolutely outraged. On March 10, members of both parties made martial speeches in Congress, and submitted resolutions calling for military intervention. Senator Ashurst of Arizona demanded "grape-shot instead of grape juice," a reference to Secretary of State William Jennings Bryan, a teetotaler and a pacifist.[66]

Wilson knew that he had to act firmly and quickly to assuage public demands. He also wished to avoid Congress, which he feared might force the country into a full-scale war with Mexico. Finally, only a prompt military response, it was felt, could prevent Villa from successfully eluding capture in the vast territory he knew so well.

Unfortunately, Carranza had his own "hawks," or more precisely, nationalists, who opposed American troops on Mexican soil under any circumstances. On the other hand, there had been cooperation in the past between the United States and Carranza regarding the pursuit of bandits across international boundaries. In the Fall of 1915, the United States had permitted Carrancista troops to be transported across American territory during the civil war against Villa. And during that same period, an informal military agreement was

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[65]Ibid., pp. 480-481.

[66]53 Cong. Rec. 3882-84, 3905ff. (1916).

obtained granting reciprocal rights of pursuit of bandits up to 15 leagues (45 miles) beyond the border.[67]

On the 10th of March, a day after the Columbus raid, Wilson ordered a military force under the command of Brigadier General John Pershing to pursue Villa into Mexico and break up his band of marauders. He set public expectations a bit higher, however, by telling the press that the expedition was aimed at capturing Villa.[68]

Thus neither Carranza nor the United States Congress were informed in advance of the orders to send troops into Mexico. Carranza was in no position to approve the intervention. He redoubled his own efforts to capture Villa, hoping to obviate any extensive American effort. He warned that war might result, and that only a reciprocal arrangement regarding the entry of forces into each other's territory would be acceptable.[69]

The Congress, for its part, voiced no objections to not being consulted. On the contrary, on March 14, 1916, the day before Pershing's force crossed the border, the House approved, 236 to 1, an Army Emergency Bill. While not explicit approval of the President's action, the intent, as

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[67]Arthur S. Link, Wilson: Confusions and Crises, 1915-1916 (Princeton, N.J.: Princeton University Press, 1964), p. 196.

[68]Haley, pp. 189-190; United States Foreign Relations, 1916, p. 484.

[69]Link, Wilson: Confusions and Crises, pp. 209-210; United States Foreign Relations, 1916, pp. 485-486.

the following exchange makes clear, was unmistakable. The resolution raised the size of the army, "if in the judgment of the President any emergency arises which makes it necessary."[70]

> Mr. HAY. As I say, the reason for this resolution is that it is immediately necessary that the border shall be protected while this expedition is going on . . . .
> Mr. DIES. Do I understand the gentleman from Virginia to say that these nineteen thousand odd soldiers would be dropped at the expiration of the Mexican trouble?
> Mr. HAY. At the expiration of the emergency, yes; the Army would be reduced to the strength now allowed by law.[71]

The one "nay" vote came from a Congressman who said he was motivated by opposition to the Punitive Expedition, as it came to be called.[72] The Senate approved the Army Emergency Bill on March 15, 69 to 0.[73]

More explicit, if belated, Congressional approval was granted on March 17, when the Senate unanimously agreed to Senate Concurrent Resolution 17. This measure had the warm support of the White House. Its preamble indicated Congressional uncertainty about whether or not American troops had already been ordered to cross the Mexican border, and mis-

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[70] 53 Cong. Rec. 4097 (1916).

[71] Ibid., p. 4098.

[72] 53 Cong. Rec. 5020-5021 (1916).

[73] Ibid., pp. 4105-8.

takenly noted the "consent" of the Carranza government. Its approval of the expedition contained detailed qualifications.

> RESOLVED. . . That the use of the armed forces of the United States for the sole purpose of apprehending and punishing the lawless bands of armed men who entered the United States from Mexico on the ninth day of March, 1916, committed outrages on American soil, and fled into Mexico, is hereby approved; and that the Congress also extends this assurance to the de facto Government of Mexico and to the Mexican people that the pursuit of said lawless band of armed men across the international boundary line into Mexico is for the single purpose of arresting and punishing the fugitive band of outlaws; that the Congress . . . joins with the President in declaring that such military expedition shall not be permitted to encroach in any degree upon the sovereignty of Mexico or to interfere in any manner with the domestic affairs of the Mexican people.[74]

In the House, however, the Resolution was referred to the Foreign Affairs Committee, where it expired.[75] Nor was the Carranza government fully persuaded by the Resolution. The First Chief stuck to his demand for "strict reciprocity," but at first did little to oppose Pershing's force of 4000.

However, when Villa proved elusive, and when the Punitive Expedition, bolstered to 6,675 men by April, plunged deeper into Mexico--350 miles south of the border--the de facto government grew restive.[76]

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[74]Ibid., p. 4274.

[75]Ibid., p. 4396.

[76]Link, Wilson: Confusions and Crises, pp. 215-18.

The Carranza government called upon the United States in late March, 1916, to sign a protocol regarding "hot pursuit" of bandits over international boundaries. The Mexicans wanted limits (as to places of entry, depth of penetration, duration of stay), all of which the United States accepted, but interpreted prospectively, so as to exclude the Pershing expedition.[77]

As tensions with Germany mounted, Wilson became especially anxious to avoid a wider conflict with Mexico. But this became increasingly difficult. On April 12, 1916, anti-American sentiment in Mexico led to an attack upon some American soldiers who had entered the town of Parral. Carranza called upon United States troops to withdraw or risk future incidents.[78]

Pershing, meanwhile, frustrated by local opposition and Carrancista non-cooperation, called for expansion of his military operation. Hoping to avoid an open break with Mexico, and yet escape the humiliation of withdrawal, the Administration decided to concentrate Pershing's force in northern Mexico while negotiating with the Carranza government for cooperation on border protection.

The negotiations, between United States General Scott

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[77]Ibid., pp. 218-219; United States Foreign Relations, 1916, pp. 502, 503, 507.

[78]The following account is based upon Link, Wilson: Confusions and Crises, pp. 282-317; and Haley, pp. 198-223.

and Obregón, begun at the end of April, 1916, were a failure. Meanwhile, Mexican bandits struck at two Texas towns in early May, and were chased 180 miles into Mexico by American cavalry. Mexico protested vigorously and insisted that all American troops withdraw. Wilson called up the militia of the states bordering Mexico; Carranza mobilized his forces to resist any further American intrusion.

In mid-June the situation grew worse. Mexican irregulars conducted border raids and again were pursued over the border by United States forces. The Mexican military informed Pershing that if he moved in any direction other than north they would attack. Wilson then mobilized the entire national guard of over 100,000 men, while Secretary of State Lansing sent a long note to Mexico justifying the Expedition and warning of "grave consequences" should the de facto government attempt to resist it by force.[79]

On June 22, 1916, an incident occurred which brought Mexico and the United States to the very brink of war. A small American reconnaissance mission, ordered to march about 90 miles east by General Pershing, clashed with de facto government troops near Carrizal, resulting in several deaths on both sides and the capture of 25 Americans. This was the first time, since the Vera Cruz landing two years

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[79]United States Foreign Relations, 1916, pp. 581-92.

earlier, that American forces engaged troops of the Mexican government.

On the 25th of June, Washington demanded the release of the prisoners, and an early statement of Mexican intentions in light of its seemingly "formal avowal of deliberately hostile action."[80]

Wilson then consulted with Congressional leaders, and set to work on a war message for Congress. The message was never delivered. (It would not have asked for a declaration of war because Mexico lacked, Wilson now reasoned, a properly constituted authority. Instead it requested the power to use the armed forces to protect the border and establish a constitutional Mexican government which would preserve order.)

American public sentiment was strongly against war with Mexico. Thus, there must have been a general sigh of relief when it was learned that the Carrizal prisoners were released. Wilson made an eloquent speech for peace before the New York Press Club, June 30, and the United States and Mexico exchanged conciliatory diplomatic notes.

In early July, 1916, both sides agreed to the establishment of a Joint High Commission to resolve mutual grievances. The upcoming Presidential elections were apparently

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[80]Ibid., p. 595.

foremost in Wilson's mind. He wished to keep Pershing in Mexico so it would not look like he was forced to abandon his vigorous defense of Americans on or south of the border. At the same time Wilson hoped to avoid an open break with Mexico.

Thus Wilson was not disturbed at the failure of the United States and Mexico to agree upon an agenda for the conference to be held at New London, Connecticut, in the Fall of 1916. He had the advantage, and he used it to press for a broad agenda including Mexican social and economic reforms. The Carranza representatives resisted any attempt by the United States to meddle in Mexico's domestic affairs; they wished to limit the discussion to troop evacuation and border problems.[81]

The Commission met from September, 1916, to January, 1917, when it adjourned without agreement. Meanwhile, Wilson was re-elected President. In January the White House decided to withdraw the "Perishing" Expedition, and by February, 1917, United States troops had been completely evacuated. Wilson even resumed diplomatic relations with Mexico, despite the objections of mining and oil interests who feared that the new Mexican Constitution endangered their holdings.

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[81]This account follows Arthur S. Link, Wilson: Campaigns for Progressivism and Peace, 1916-1917 (Princeton, N.J.: Princeton University Press, 1965), pp. 51-55, 120-23, 328-38; and Haley, pp. 230-47.

III. The Mexican Interventions and the Constitution

I have said that the Mexican War of 1846 raised constitutional questions even though Congress had declared that a state of war existed. The facts are that President Polk had already ordered American troops to enter the disputed territory between the Nueces and the Rio Grande, that these forces had established a blockade of the Rio Grande, an act of war in international law, and that fighting between the armies of the respective governments had already begun before the Congress was consulted.

Furthermore, Polk misled Congress when he insisted that the ambushed American troops were killed on "American soil." United States claims to the territory were dubious at best, and Polk would have been more honest had he referred to it as "disputed" territory.

All this having been said, it must be noted that Congress was ignorant of neither the Polk administration's provocative activities nor of what could be expected from the Mexican government in response. And still it overwhelmingly approved a resolution of war. Although the legislature was left with little choice other than to approve or condemn a Presidential fait accompli, it followed through in good constitutional form.

But to the extent that Article I, section 8, clause 11 looked to the participation of Congress in the decision to go to war, surely the spirit of the Constitution, if not

its letter, was violated in 1846.

In 1914, President Wilson dispatched a fleet to Mexican waters allegedly to obtain redress for insults to the American flag, but actually to depose a Mexican regime of which he disapproved. Marines were ordered to land just moments before the President went before Congress to ask for its support, and only the House had acted prior to the outbreak of fighting.

Wilson did not reveal his real motives in addressing Congress, but rather outlined in misleading fashion an alleged pattern of indignities. The Congressional leadership was informed about the Administration's real intentions; blocking the arms shipment to Huerta en route to Mexico. The Republican minority tried to broaden the resolution to include protection of Americans in Mexico, but were unsuccessful.

Thus, although Congress knew that the alleged indignities were merely a pretext, it went along with the charade. The President went on to insist that under the circumstances he had the constitutional authority to order the use of armed force "without recourse to the Congress." The Congress seemed to acquiesce in the Administration's interpretation of Presidential power, as indicated by the debates on the Hill, and the use of the word "justified" rather

than "authorized" in House Joint Resolution 251.[82]

On the other hand, Wilson did in fact request legislative approval, and Congress did feel warranted, if not constitutionally obliged, to grant that approval. Thus, the Vera Cruz landing does little to clarify the boundaries of executive versus legislative war-making power.

It does, however, establish a clear precedent for the President to order the occupation of a foreign port with the support of Congress short of a declaration of war. House Joint Resolution 251 expressly disclaimed any hostile or war-like intent on the part of the United States government, and therefore could not have been designed to be a declaration of war.

As to the circumstances under which the President may so act, according to the Wilson administration and the 63rd Congress, affronts and indignities committed against the United States government are sufficient, although as we have pointed out, both branches knew this was a mere pretext.

To summarize: given certain alleged affronts and indignities to the United States, the President, with the support of Congress, though not necessarily by its authority, ordered the occupation of a foreign port.

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[82]See notes 34, 37 and accompanying text, supra.

Finally, we consider the constitutional implications of the Punitive Expedition of 1916. When President Wilson ordered 4000 American troops to cross the border with Mexico on March 10, 1916, he acted without informing Congress. In fact he had intentionally avoided the legislature for fear that it would force the United States into a full-fledged war with Mexico.

Within a week of the orders, however, both houses of Congress had indicated some sort of approval of Wilson's action. Both chambers ratified the Army Emergency Bill, but only the Senate gave explicit endorsement to the Mexican intervention. The reasons for the refusal of the House to go along are not clear.

The Senate resolution, as was the case with the Vera Cruz occupation, did not authorize any Presidential action, rather it "approved" Wilson's course. However, unlike the 1914 intervention, this time Wilson did not feel obligated to go before Congress. Perhaps in the 1916 intervention, Presidential authority was less doubtful.

After all, this was not simply a case of intervening to protect American citizens abroad. Villa's raids occurred on the American side of the border; thus they were analogous to an invasion of United States territory. And although Villa represented no official government, the Mexican government was unable to control him. Under such circumstances

the President's authority to order pursuit of Villa was comparable to his power to respond to a surprise attack on the country.

Yet such power would seem to be qualified by the very great risk that, as a result of the violation of the other nation's sovereignty by the pursuing force, war between two sovereign states will result. In such a case, the President will have run afoul of the Constitutional prerogative of the Congress to declare war. The Carrizal incident, where American and Mexican government forces clashed, highlights the dangers involved.

Nineteenth century precedents tend to support the principle that the President may take unilateral action in such circumstances. In 1817, President Monroe commissioned Andrew Jackson to punish the Seminole Indians, runaway slaves and white bandits who committed sporadic outrages and then retreated across the international boundary into Florida (then a Spanish possession). Jackson's foray across north Florida and his summary execution of two British subjects nearly forced the United States into war. At no time was Congressional authority requested, but afterwards, in the wake of tumultuous Congressional debate, motions to condemn Jackson were beaten back.[83]

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[83]Bailey, pp. 168-72.

By contrast, before responding to border difficulties with Mexico, President Buchanan went before Congress in 1859 to ask for permission to use force. But in the 1870's and 1880's the executive branch reassumed the initiative; troops crossed the border with Mexico without Congressional authorization at least 20 times.[84]

What Constitutional principle then may be inferred from these various cases so similar in circumstance to the Punitive Expedition? It would seem that when marauding bands based in an adjoining foreign country conduct raids across the American border, the President may on his own authority order pursuit by the United States armed forces even across the international boundary.

Among the historical precedents, the only qualifications upon the President's power would seem to be Buchanan's circumspect behavior in 1859, and the Senate resolution of approval in 1916. I do not believe that the 1916 resolution impinges upon the authority of the President to reply forcefully and spontaneously to border raids. However, since this measure enumerated in detail the limited intentions of the Punitive Expedition, it may serve as a precedent for Congressional, perhaps even Senatorial, restriction of such interventions once they have been initiated by the President.

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[84]See note 7 and accompanying text, supra.

CHAPTER VI

EXPEDITIONS TO SIBERIA AND NORTH RUSSIA, 1918

The American interventions in Russia--two expeditions to disparate geographical points--comprised one of the strangest and most complex episodes in American military and diplomatic history. It is indicative of the confusion surrounding them that General William S. Graves confessed as follows many years later:

> I was in command of the United States troops sent to Siberia and, I must admit, I do not know what the United States was trying to accomplish by military intervention.[1]

To this day historians cannot agree on the motivation or the subsequent aims of the interventions, and each hypothesis suffers, it seems to me, some glaring defects. For instance, one contends that the primary aim was to further America's efforts against Germany in the First World War.[2] But then how do we explain the decision to keep troops in Russia after the Armistice had been signed?

At the other extreme is the contention that this was

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[1]William S. Graves, America's Siberian Adventure, 1918-1920 (New York: Peter Smith, 1965), p. 354.

[2]Leonid I. Strakhovsky, The Origins of American Intervention in North Russia (1918) (Princeton, N.J.: Princeton University Press, 1937), passim.

primarily an effort to contain communism.[3] This claim must be balanced against the abundance of primary evidence demonstrating the overriding concern of the major policy-makers with the German war effort. It also overlooks or ignores Washington's repeated refusal to adopt the French plan to topple the Bolsheviks.

A third factor has been held to be the key to understanding the Siberian (but not the north Russian) expedition: America's desire to maintain the Open Door in the Far East against Japanese imperial designs.[4] There is little documentary evidence to support this claim. Furthermore, Japan was a war-time ally who was invited to intervene jointly with the United States and was asked for no assurances regarding its future course in the area when the United States unilaterally withdrew. Japan announced its withdrawal two years later.

My purpose, however, is not to offer the definitive historical narrative of these affairs, but to recount the events with an eye toward assessing the constitutional status of President Wilson's action.

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[3]Frederick L. Schuman, American Policy Toward Russia Since 1917 (New York: International Publishers, 1928), passim; William A. Williams, American Russian Relations, 1781-1947 (New York: Octagon Books, 1971), passim.

[4]Betty M. Unterberger, America's Siberian Expedition, 1918-1920 (Durham, N.C.. Duke University Press, 1956), passim; John A. White, The Siberian Intervention (Princeton, N.J.: Princeton University Press, 1950), passim.

To accomplish this we must take account of the motivations for the expeditions. Were they the legitimate exercises of a Commander-in-Chief deploying troops so as to defeat Germany against which Congress had declared war? Or was the war with Germany a convenient cover for a constitutionally questionable undertaking aimed at the Japanese or the Bolsheviki?

Furthermore, we must examine the status of Russia vis-à-vis the United States. Was Russia at the time of the expeditions still America's war-time ally to which the President might legally send troops against the common enemy? Or had Russia indeed become neutral, as the Soviet Government claimed, but unable to resist American military intervention?

It is these questions in addition to our standard inquiries into Presidential and Congressional action which we must keep in mind as we try to sort out the historical tangle surrounding the Siberian and north Russian expeditions.

I. Historical Background and the Decision to Intervene

By the end of 1914 Europe had divided into two armed camps, and was about to embark upon a struggle of unprecedented proportions. On one side were the so-called Central Powers: Germany, Austria-Hungary and Turkey. Opposed were the Entente Powers, or simply the "Allies:" Russia, France,

Great Britain, Japan, Belgium, Serbia and Montenegro. Italy joined the Allies in 1915.

Provoked by attacks on American shipping, President Wilson asked a special session of Congress to declare war against Germany on April 2, 1917. Two days later the legislature resolved

> That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared . . .[5]

Germany calculated that the war in Europe would be over by the time the United States mobilized and dispatched an appreciable number of troops. German calculations were partly correct; it was not until Autumn 1917 that Americans began to fight "over there."[6]

Meanwhile a great war-weariness swept Europe. An estimated 4,000,000 men had been slain, millions more wounded. The governments of Europe tottered on the brink of bankruptcy.[7] Nowhere was the revulsion greater than in Czarist Russia. In March, 1917, army mutinies, bread riots and industrial strikes forced the Czar to abdicate. The United

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[5]55 Cong. Rec. 200 (1917); Joint Resolution Declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States and making provision to prosecute the same. 40 Stat. 1 (1917).

[6]F. Lee Benns, European History Since 1870, 4th ed. (New York: Appleton-Century-Crofts, 1955), pp. 364-67.

[7]Ibid., p. 371.

States rejoiced to be allied with a liberal regime, and quickly recognized the provisional government. Provisional War Minister Alexander Kerensky vowed to continue the unpopular struggle.

In July 1917, in Galicia, the whole Russian line collapsed before the advancing German columns. This played directly into the hands of the Bolsheviks, led by Lenin, whose slogan was "Peace! Land! Bread!" Only a few months earlier Lenin had been transported back to Russia from Switzerland by the Germans, who hoped that he would further the disruption in Russia.

The Bolshevik program was nearly irresistible to the war-sick Russians. In November, 1917, a successful coup d'état toppled the provisional government. A "Soviet of the People's Commissars" was established, with Lenin as chairman and Trotsky as Commissar for Foreign Affairs. Washington refused to recognize the new regime, believing it weak and under German influence.

Soon after the Bolsheviks assumed power in Petrograd, Trotsky circulated a memo calling for an armistice. The Allies, of course, ignored the note, but the Germans, eager to eliminate the eastern front in time to transfer troops to France for a Spring offensive, responded quickly and favorably. On December 15, 1917, an armistice between Russia and the Central Powers was agreed to at Brest-Litovsk.

But Germany was not content with an armistice; it wanted a treaty ceding much of eastern Europe, including Russia's grain-rich Ukraine.[8]

The Soviets, hoping to delay their capitulation, stalled and the peace talks dragged on through the Winter. France and England were especially bitter as their intelligence reported massive German troop movements from the east to the west. They were convinced that the Bolsheviks were either agents of the Germans or their unwitting dupes. This belief was widespread among the American public, and even found favor in official Washington.[9]

Notwithstanding the reduction in troops and the Brest negotiations, the Germans resumed their advance upon Russia in the Ukraine to the south, and through Finland in the north.[10] This was in late February, 1918. At the same time the Soviets feared imminent Japanese intervention in the east. Aware of Allied anxieties over the collapse of the eastern front, Lenin and Trotsky opened informal contacts with Allied representatives in Russia, dangling before them the hope of a revived eastern front.[11]

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[8]Ibid., pp. 376-377.

[9]George F. Kennan, Soviet-American Relations, 1917-1920, Vol. 2: The Decision to Intervene (Princeton, N.J.: Princeton University Press, 1958), pp. 3-9.

[10]Strakhovsky, Origins, pp. 14-17.

[11]Kennan, pp. 107-108.

In their desperation the Soviet leaders attempted to exploit war-time rivalries by playing one international coalition off against another. The peace with Germany was so fragile, and the threat of Japanese expansion into Soviet Siberia so great that the "breathing-space" essential to consolidate the revolution appeared tenuous at best. In his "Six Theses concerning the Current Tasks of Soviet Power," written in late April, early May, 1918, Lenin describes their tactics.

> The international position of the Soviet republic is difficult and critical in the extreme, because the most deeply rooted interests of international capital and imperialism impel it . . . not only toward military pressure on Russia but also toward mutual agreement concerning the division of Russia and the strangling of Soviet power.
>
> Only the sharpening of the imperialist slaughter of the peoples in western Europe and the imperialist rivalry of Japan and America in the Far East paralyze or restrain these tendencies . . .
>
> For this reason the Soviet republic must . . . follow a course of maneuver, of retreat, and biding one's time until the moment when the proletarian revolution . . . in a number of advanced countries, comes to fruition.[12]

On March 3, 1918, in their panic over the renewed German advance, Lenin and Trotsky followed the course of "retreat" and agreed to the harsh Brest-Litovsk Treaty. This act and the repudiation of Russian state debts on February 8

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[12]Quoted in ibid., pp. 132-133.

served to antagonize the Allies against the Bolsheviks.[13]

Nevertheless, because of a mutual anxiety with regard to Germany (France and England were most upset over the impending German Spring offensive on the western front which was launched March 21; Trotsky was convinced that the Brest peace would not end German penetration in Russia), some form of Allied-Soviet collaboration seemed possible in March and April.

On March 5--two days after the Brest treaty was signed, but before it was ratified--the Soviet leaders handed an informal American representative a note asking "what kind of support" the United States would give should the war with Germany be renewed. It further asked what the United States would do should Japan "attempt to seize Vladivostok and the Eastern Siberian Railway."[14]

The American representative, Lieutenant Colonel Raymond Robins of the American Red Cross Commission in Russia, was convinced that the Soviets would accept United States aid in reconstituting the eastern front. Other Americans, such as Ambassador David R. Francis, were more skeptical. Francis had seen documents "whose authenticity I do not doubt," purporting to prove that the Bolsheviki leaders were "in German pay." Although Francis was probably sincere, these documents

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[13]C. K. Cumming and Walter Pettit, Russian-American Relations, March 1917-March 1920: Documents and Papers (New York: Harcourt, Brace & Howe, 1920), p. 77.

[14]Ibid., pp. 81-82.

which were obtained by Edgar Sisson, director of the United States wartime propaganda program in Petrograd, were undoubtedly forgeries.[15]

The Sisson documents, unearthed in March, 1918, reinforced the common though false theory that the Bolsheviks were German agents. They helped thwart Robins' attempts to attain Soviet-American cooperation. On March 11, the day before Trotsky's queries to Robins were cabled to Washington, a message from President Wilson to the Congress of Soviets was delivered. The note expressed "sincere sympathy" for the Russian people in light of the renewed German attack, but declared that the United States "is unhappily not now in a position to render . . . direct and effective aid."[16]

On March 19, Ambassador Francis was informed that Washinton considers the President's message an "adequate answer" to Trotsky's requests. Meanwhile, on the 16th the Congress of Soviets ratified the Brest treaty. Despite this, informal contacts between Robins and the Bolshevik leaders continued through the end of April. In May Robins was recalled, Washington having given no support to his efforts toward Soviet-American collaboration.

Undoubtedly, American mistrust of the Bolsheviki in-

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[15]United States, Department of State, Foreign Relations of the United States, 1918, Russia, 3 vols. (Washington: Government Printing Office, 1931), 1:371-78; Kennan, p. 179.

[16]United States, Foreign Relations, 1918, Russia, 1:395.

creased when in late April formal diplomatic relations between Russia and Germany were renewed. The arrival of the new German Ambassador, Count Mirbach, so alarmed Francis that he recommended Allied intervention even without Bolshevik collaboration, because "Mirbach is dominating Soviet government and is practically dictator in Moscow."[17]

Diplomatically, the Bolsheviki remained personae non gratae as far as the United States was concerned. In a memo to Japan read just after the Brest treaty was signed, the United States declared that

> {i}t does not feel justified in regarding Russia either as a neutral or as an enemy, but continues to regard it as an ally. There is, in fact, no Russian government to deal with. The so-called Soviet government upon which Germany has just forced . . . peace was never recognized by the Government of the United States as even a government de facto. None of its acts, therefore, need be officially recognized by this Government . . .[18]

During the period in which the plans for cooperation were being considered and rejected events were moving apace in the northern region of European Russia. With its Baltic ports closed by the war, Russia's Arctic coast ports became her only maritime links to the Atlantic. Most important of these were Murmansk, built principally with British aid in 1915, and Archangel, doubly important to the Allies because

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[17]Ibid., p. 520.

[18]Ibid., p. 397.

of a large cache of arms and supplies stored there for use by Russia during the war.

The supplies at Archangel added another element to the growing mistrust between the Allies and the Bolsheviks. In February, 1918, as we have noted, the Bolsheviks repudiated all the debts of pre-Soviet Russia. At the same time they began to remove the supplies at Archangel which had been purchased through the use of credits advanced by the Allies. One can understand Allied dismay at seeing the Bolsheviki take the supplies while at the same time disavowing their debt and announcing Russia's withdrawal from the war. This helped fuel the German-agent theory because it was assumed that the Soviets would transfer the goods to Germany as part of the Russo-German peace agreement. There was no basis in fact for this belief; the Bolsheviks wanted the supplies for themselves.[19]

The second crucial element preceding intervention in the north was the Allied belief--and this too was false--that the Germans would lead neighboring Finnish troops in an attack on Murmansk in the Spring of 1918. But the Allies were not alone in their misjudgments; Trotsky, too, expected an imminent German attack, and as a result drafted a hasty message to the Murmansk soviet to "accept any and all assistance from the Allied missions" to thwart the German advance. This

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[19]Kennan, pp. 19-21.

command was later used to justify collaboration by Murmansk officials with the Allies. In the 1930's, Stalinist historians cited it to discredit Trotsky.[20]

Allied alarm over the German threat to the north Russian ports led England and France to send warships to Murmansk in late February while requesting that the United States do the same. Upon receipt of intelligence reports that a sizable German naval contingent was moving northward in the Baltic, the British, after working out an agreement with the Murmansk Soviet, quietly slipped a few hundred marines ashore. The date was March 6, 1918.[21]

On March 5, the United States refused "for the present" to send a war ship to the area. But after informal pleas of Murmansk officials to balance the British presence (they did not fully trust the British), Ambassador Francis recommended to the State Department and American Military Attaché, Colonel James A. Ruggles, advised the War Department that an American vessel was needed. Accordingly, on April 4, President Wilson agreed to send a war ship providing that the commander be cautioned "not to be drawn in further than the present action there without first seeking and obtaining instructions from home."[22]

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[20]Ibid., pp. 42-43, 46-47.

[21]Ibid., pp. 44, 48-52.

[22]Ibid., pp. 44, 55-56.

In late April, 1918, an American ship was dispatched with orders to cooperate with the British Rear Admiral at Murmansk to "further the Allied interests generally, and to assist in recovering the Allied stores at Archangel." In addition, although he may not "commit himself to land military operations away from the port," the commander may utilize the crew "for the purpose of stiffening the local resistance against the Germans." No mention was made about the President's caveat against being "drawn in" without instructions from Washington.[23]

While the war effort against Germany was gradually involving the United States in north Russia in the Spring of 1918, a more complex set of developments was ensnaring Washington in the Russian Far East. Military elements in Japan were plotting a take-over of the Chinese Eastern Railway (a link in the Trans-Siberian rail system) and of Eastern Siberia. This alarmed the United States which feared a threat to its "open door" policy of equal commercial opportunities for all in the Far East.[24]

Thus, although the United States and Japan were ostensibly allied against Germany, the relationship was an uneasy one due to the rivalry in eastern Russia. This rivalry often

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[23]Ibid., pp. 56-57.

[24]Unterberger, p. 231.

revolved around the Trans-Siberian Railroad, the principal source of supplies over the vast stretch of eastern Russia, some 4,700 miles from Vladivostok on the Pacific to the Ural Mountains. The rail system was so vital that when it began to break down during the war the Kerensky government quickly invited an American commission of railway engineers headed by John F. Stevens to survey and recommend improvements. The Stevens commission arrived in June 1917. In November of that year, at the request of the Provisional Government, 300 American engineers were sent to assist operations along the rail line. Their work was interrupted by the Bolshevik Revolution. The Stevens Commission proved to be the forerunner of American intervention.[25]

Various independent anti-Bolshevik forces contested Soviet power all along the railway zone. Most noteworthy, in addition to General Dmitri L. Horvat of the Provisional (Kerensky) government, who still claimed to be in authority, were conservative naval officer Alexsander V. Kolchak, and the brutal Cossack chieftains Gregorii Semenov and Ivan Kalmikov. Soon England, France and Japan aided and encouraged these groups, the European allies trying vainly to revive the eastern front, Japan attempting to sow discord in the Far East. Actually, these White factions were almost as

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[25]Ibid., pp. 8-10.

opposed to one another as they were to the Bolsheviki.[26]

Throughout 1917 Wilson was urged to help Russia resist Germany by intervening in Siberia or by asking Japan to intervene on the Allies' behalf. Thus the idea of intervening was not simply a response to the Bolshevik Revolution. Although after the Brest talks and especially after the German Spring offensive began, the appeals to intervene grew stronger. There were also pleas to intervene from the various American representatives in the Far East, most of these men being influenced by their regular contact with the anti-Bolsheviks. Wilson steadfastly resisted, his top military advisers being opposed to it on military grounds, and there being reluctance to encourage unilateral Japanese action.[27]

One of the major Allied concerns in the Far East was the huge cache of war supplies (four times the amount at Archangel) being stored at Vladivostok. As in the north this matériel had been intended for Russia's use against Germany; now it was feared that the Bolsheviki would transfer it into German hands. As Bolshevik power in Vladivostok grew, so did Allied alarm. In January, 1918, England and Japan sent war ships to the port, and on March 1 they were joined by the U. S. S. Brooklyn.[28]

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[26]Ibid., pp. 14-18.

[27]Ibid., pp. 18-27.

[28]Kennan, pp. 59, 61.

It might plausibly be asked how events in the Far East could have influenced the fighting on the eastern front many thousands of miles away. One answer is that there were an estimated 1.6 million soldiers and officers of the Central Powers being held as prisoners of war in Russia at the time of the November Revolution, half of whom were in eastern Russia. Actually, less than a tenth of these were Germans, the bulk belonging to the various nationalities comprising the Austro-Hungarian Empire.

At the time of the Brest treaty, rumor had it that the P. O. W.'s were being re-armed by the Bolsheviki. The Soviets did in fact conduct a brief campaign to recruit these men on the grounds that class solidarity cuts across national boundaries. But this effort was not very successful; reports of a P. O. W. threat were gross exaggerations fed by anti-Bolshevik propaganda. Furthermore, there were more accurate reports of the P.O.W. situation available since two first-hand investigations of the situation were conducted by the United States in late March, 1918.

The data of both of these independent reports (although the conclusions of one of them emphasized the potential threat) contradicted the alarmist accounts being received by the State Department. Nevertheless, on March 24, Secretary of State Lansing wrote the President that reports of "military prisoners in Siberia . . . being organized under German

officers" persist, and because of this German menace to the Far East the United States should reconsider its policy regarding Allied intervention.[29]

Franco-British pressure on Wilson must have been intense, for on March 1, the day the Brooklyn arrived in Vladivostok, the President agreed to acquiesce in a Japanese landing in Siberia. But only four days later Wilson reversed himself, fearing that a Japanese intervention would drive Russia into German hands, while United States approval would damage America's moral standing.[30]

But this decision did nothing to reduce Allied pressure on Washington. On April 5, Japan and England landed small contingents of armed men in Vladivostok where Bolshevik strength was growing. The commander of the Brooklyn refused to participate and Secretary of State Lansing turned down another British plea for American involvement. Meanwhile, the Soviet leaders in Moscow were alarmed, believing that the long-rumored full-scale Japanese intervention had begun.

Thus we may summarize the situation as of May, 1918, as follows. In the Far East Japan and England landed forces at Vladivostok while the United States believed it had resisted Allied pressure to participate. In the Russian north, the

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[29]Ibid., pp. 71-81; Unterberger, pp. 45-47; United States, Department of State, Foreign Relations of the United States: The Lansing Papers, 1914-1920, 2 vols. (Washington: Government Printing Office, 1940), pp. 357-358.

[30]Unterberger, pp. 30-33.

Bolsheviki had virtual control over Archangel and were busily moving its stores inland, while British forces had landed at Murmansk with the approval of the local Soviet. Allied activity in the north began to alarm Germany, leading her to pressure the Soviets into protesting these alleged violations of the Brest treaty.[31]

The Soviets had resumed diplomatic relations with Germany, and as they gained confidence that Germany would not destroy them, they rejected collaboration with the Entente. On May 12 or 13, Lenin wrote that "we at the given moment cannot enter on a military agreement with the Anglo-French coalition."[32]

Ironically, at the same time the United States attitude toward the Bolsheviks had hardened, as evidenced by the recall of Red Cross chief Raymond Robins. Despite the favorable recommendation of his trusted aide, Colonel House, Wilson rejected the British plan to send troops to Russia with Soviet approval. As we have seen, by May 12 or 13, such Soviet agreement could no longer have been obtained.[33]

At this time fighting on the western front was fierce, the Germans having made considerable progress in their drive toward Paris, with great losses on both sides. This undoubt-

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[31]Kennan, pp. 245, 251, 258.

[32]Ibid., pp. 127, 134.

[33]Ibid., pp. 128-129.

edly led England to adopt in secret a plan to send an expedition to the Russian north which was somehow to be linked up with anti-Bolshevik forces in Siberia in order to reconstitute an eastern front. France was much in favor of toppling the Soviets instead of collaborating with them. There is no evidence that Washington was told of the plan.[34]

Without offering any details of their grand scheme for fear of alienating the Americans, Great Britain stepped up the pressure on the United States to intervene. But when the British began to speak of the north Russian and Siberian interventions together, Secretary of State Lansing retorted that the United States considered them two separate questions. Lansing went on to say, as he described his conversation in a May 11 note to the President,

> that intervention at Murmansk and Archangel would receive far more favorable consideration on our part than intervention in Siberia, for the reason that we could understand the military advantage of the former but had been unable, thus far, to find any advantage in sending troops to Siberia.[35]

On May 20 the President wrote Lansing that the two questions "must not and cannot be confused and discussed together," and that his top military advisers thought it best not to divert any American troops from the western front.[36]

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[34]Ibid., pp. 263-66.

[35]United States, Foreign Relations, 1918, Russia, 2:160.

[36]Lansing Papers, 2:360-361.

In late May Washington was bombarded with reports of German encroachment in the Murmansk region coupled with British pleas for assistance. Actually, Germany had stepped up its military and naval activity in the area in response to the Allied buildup (!), but the reports received by Washington greatly exaggerated the German threat.[37]

Nevertheless, the reports must have had their effects, because Lansing noted in a June 3 memo that President Wilson

> was entirely willing to send troops to Murmansk provided General Foch approved the diversion of troops . . .[38]

French general Foch had recently been placed in command of all Allied armies, and was actually in favor of intervention against the Bolsheviki. So when the Allied Supreme War Council, General Tasker H. Bliss representing the United States, adopted Joint Note No. 31 on June 3, calling for an Allied expedition to north Russia, it seemed that the die had been cast.

Yet weeks of war-time confusion followed. England demanded of Washington more troops than General Bliss thought he had agreed to. Washington was unsure of General Foch's views on diverting men and ships from the western front. Finally, the senior military advisers opposed the expedition.

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[37]Kennan, pp. 269, 370.

[38]United States, Foreign Relations, 1918, Russia, 2:484-485.

"None of us," Secretary of War Newton D. Baker confessed, "can see the military value of the proposal."[39]

Actually, during this period of poor inter-Allied communication, American troops had already been landed on Russian soil. We have noted the dispatch of an American ship to Murmansk with instructions to obey the orders of the British admiral in promoting Allied interests (see p. 216, above). So when English and French troops left the city to quell a Germano-Finnish threat, 150 United States marines were put ashore on June 11 to replace them. Since the local Russians were collaborating with the Allies the Americans did no fighting.[40]

Incidentally, this collaboration between the Murmansk soviet and the Allies had become by mid-June a real thorn in the side of the Moscow Bolsheviki. At first, Moscow issued half-hearted protests against the Allied presence in order to placate the Germans without alienating the Entente. But now Murmansk's independence was a challenge to Moscow's authority, and as suspicions regarding Allied motives grew, her actions had become downright treasonous. Thus, while Washington procrastinated Murmansk had become more hospitable toward the Allies and more hostile toward the Bolshe-

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[39]Kennan, pp. 366-69, 377-378.

[40]Strakhovsky, Origins, p. 51.

viki.[41]

By the end of June the United States had ironed out its differences with England regarding the Murmansk expedition. Wilson personally decided to send three battalions--about 4,500 men--despite War Department opposition. Secretary of War Baker later wrote that he had convinced the President "that it was unwise, but he told me," Baker explained,

> that he felt obliged to do it anyhow because the British and French were pressing it upon his attention so hard and he had refused so many of their requests that they were beginning to feel that he was not a good associate, much less a good ally . . . .[42]

Wilson's formal acquiescence did not come until July 17 in an Aide-Mémoire to the Allies. Public announcement was made on August 3, and a month later American troops arrived in the freezing Russian north. The July 17 Aide-Mémoire also announced America's decision to participate in a multi-national Siberian expedition, and it is to the genesis of this decision that we now turn. One point seems clear: the original motive for United States participation in the northern expedition was a desire to be a good ally and hopefully to combat German encroachment in the area. Little thought seems to have been given in Washington to the position of the Bolsheviki.

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[41]Kennan, p. 371.

[42]Ibid., p. 378.

Recall that as of May, 1918, the United States believed it had closed the door on plans for a Siberian intervention, declaring it unrelated to the north Russian question and of even less military value. And yet Washington was convinced that something ought to be done to meet the threat of the German P.O.W.'s and Bolsheviki-German collaboration (neither of which were authentic threats) without encouraging Japanese imperialism.

The final piece to the puzzle was supplied by the Czech Legion in Russia in late May, 1918, (although Washington did not become aware of the situation until mid-June. Even before the World War there was a Czech colony in Russia, and a Czech unit fought in the Czarist army. When war ensued many Czechs, ardent nationalists, deserted the Austro-Hungarian army to fight on the Russian side, dreaming of an independent Czech nation. Czarist Russia, a multi-national empire, did nothing to encourage national self-determination movements, but the Kerensky government permitted the formation of a Czech Corps.

In February, 1918, when the German army began its advance in the Ukraine the Czechs resolved to cross Russia via the Trans-Siberian Railroad to Vladivostok where Allied ships were to transport them to France to fight on the western front! Units of this force of 70,000 began to move east with hastily granted Soviet permission.

The Czechs were the only stable fighting force loyal to the Allies on the eastern front. This fact seems to have dawned upon the Bolsheviki and the Allies at roughly the same time. While England was proposing to the Allies that the Czechs be used to reconstitute the eastern front (by splitting the Corps and linking them with the Allies in the north and the Japanese in the east) mutual animosity was developing between the Czechs and the Bolsheviks.

The Bolsheviks had second thoughts about permitting such a heavily armed fighting force to traverse Russia and so they tried to get them to give up some of their arms. The Czechs suspected that this action was German-inspired, and anyway they still felt a sense of obligation to the Russian Whites who had encouraged their formation. By the end of May Czech-Bolshevik antagonism had ripened into armed hostility all along the rail line. This was the spark that touched off the Russian Civil War.[43]

During the month of June the Czechs seized control of western Siberia, and the ten to fifteen thousand Czechs who had already arrived at Vladivostok (where they found no Allied ships to take them to France), determined to move westward to the aid of their fellow soldiers fighting the Reds. Anti-Bolshevik Russians and Allied and American agents in

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[43]Ibid., pp. 136-65; Unterberger, pp. 54-60; William H. Chamberlin, The Russian Revolution, 1917-1921, 2 vols. (New York: Macmillan Co., 1935), 2:1-23.

Russia did everyting they could to encourage the Czechs to stay in Siberia and fight the Bolsheviki.

When a confused and somewhat distorted picture of the Czech situation trickled into Washington in mid-June, President Wilson, who was "sweating blood" over the Siberian question, now moved toward a major decision. The Czech struggle introduced, in Lansing's words, "a sentimental element," the perfect justification for intervention. Three events then took place around the end of June which clinched Wilson's decision.[44]

First was a message from Generalissimo Foch urging United States support for an expedition to Siberia, which he considered "a very important factor for victory." This came on the heels of a Japanese statement that it would not intervene unilaterally in the Far East, but would only act after agreement with the Allies and the United States. Finally, on July 2, the State Department received a wire reporting the overthrow of the Vladivostok Soviet by the Czechs and the landing of armed detachments by Japan and England. The commander of the U.S.S. Brooklyn landed a small armed guard to protect the American Consulate.[45]

On July 3 the Supreme War Council's lengthy plea for

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[44]Kennan, pp. 381, 395.

[45]Ibid., p. 391; Lansing Papers, 2:365; United States Foreign Relations, 1918, Russia, 2:235.

extensive intervention to "save the Czecho-Slovaks," insure Allied control of Siberia "to the Urals," and to recreate an eastern front in order to "win the war in 1919{!}," arrived at the State Department. Three days later the President presented his plan for Siberia at a conference with Lansing and top military leaders. At this conference it was agreed that

> the establishment of an eastern front through a military expedition, even if it was wise to employ a large Japanese force, is physically impossible . . .

Furthermore, it was decided that the Czechs should be aided by having Japan furnish small arms, by landing available forces to hold Valdivostok, and by assembling there a force of 7000 Japanese and 7000 Americans in order to

> guard the line of communication of the Czecho-Slovaks proceeding toward Irkutsk . . .

Irkutsk, scene of clashes between the Czechs and the Bolsheviks, was some 1500 miles west of Vladivostok on the Trans-Siberian Railway. Finally, it was agreed that the United States and Japan would publicly announce their intention to aid the Czechs "against German and Austrian prisoners," and not to interfere in Russia's internal affairs or impair her political or territorial sovereignty.[46]

That same day the U.S.S. Brooklyn was told to hold Valdivostok as a base of safety for the Czechs and "as a

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[46] United States Foreign Relations, 1918, Russia, 2:241-46, 262-263.

means of egress for them should the necessity arise."[47] Nowhere is there any mention of the Bolsheviki, the real adversaries of the Czechs. The stated intention was to protect the Czechs moving westward to help their compatriots; but was this the aim of having them hold Siberia or ultimately leave via Vladivostok for the western front? The instructions to the Brooklyn (quoted above) suggest that they might not be leaving, or at least not right away.

America's aims in Siberia seem to have been to thwart both Japanese and alleged German designs in the area, while hoping to mollify its interventionist war-time partners. Little consideration was given to the Bolsheviks as an indigenous independent force in Russia; either they were underestimated or passed off as German collaborationists. It is clear that the United States had no intention of marching into central Russia to re-establish an eastern front.

On July 17 the United States announced its policy to the Allies in President Wilson's Aide-Mémoire, a summary and paraphrase of which was made public two weeks later (August 3). This document is a rather remarkable combination of Wilsonian idealism and misrepresentation of the situation in Russia. It begins by reaffirming America's dedication to win the war against the Central Powers by fighting on the western front, and rejects full-scale military intervention in Russia

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[47]Ibid., p. 263.

in order to bring her back into the war. It goes on to approve "military action" in Russia, but

> only to help the Czecho-Slovaks consolidate their forces and get into successful cooperation with their Slavic kinsmen and to steady any efforts at self-government or self-defense in which the Russians themselves may be willing to accept assistance. Whether from Vladivostok or from Murmansk and Archangel, the only legitimate object for which American or Allied troops can be employed . . . is to guard military stores which may be subsequently needed by Russian forces and to render such aid as may be acceptable to the Russians in the organization of their own self-defense.

The note concludes with a solemn pledge to the Russian people not to interfere with Russia's political sovereignty, nor intervene in her internal affairs, nor impair her territorial integrity. Finally, it calls upon "all associated in this course of action" to grant the same assurances.[48]

Most remarkable is the degree to which the Aide-Mémoire completely ignores the reality of Bolshevik power in Russia. The fact is that Wilson could not help the Czechs without opposing the Bolsheviki, against whom they were locked in mortal combat. And he could not "steady any efforts at self-government" without choosing between communist and anti-communist factions. There was in fact a flat contradiction between the President's policy of aiding the Czechs and "steadying" the Russians, and his pledge of non-interfer-

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[48]Ibid., pp. 287-290.

ence in Russia's internal affairs.

Wilson seems to have chosen this course as a compromise between Anglo-French demands for large-scale military intervention to reestablish an eastern front and his own desire to thwart the Germans without sanctioning unilateral Japanese action or diverting large numbers of American troops.

II. Congress, the Bolsheviks and the Japanese

The United States Congress played little role in the decision to intervene. Back in March, 1918, when Wilson first agreed to endorse a Japanese landing one Congressman filed a resolution of protest, but this proved meaningless when Wilson reversed himself a few days later. (See p. 220, above.) That Spring the only other Congressional sentiment regarding Russia, and one destined to grow in popularity, was that the Bolsheviks were German agents actively betraying the Russian people.[49]

By the first week in June, when talk of intervention and perhaps an economic commission to Russia was in the air, Republicans began making public speeches favoring intervention. The Administration feared that Russia would become a partisan issue. On June 10, Senator King of Utah, a loyal Wilsonian Democrat, offered a proposal for an anti-German

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[49] 56 Cong. Rec. 2590-2591, 3028, 3030 (1918).

propaganda commission and an Allied-Japanese-American military expedition to go to Russia. The resolution died in the Foreign Relations Committee.[50]

In late June the recalled Red Cross chief, Raymond Robins, arrived in Washington anxious to warn against intervention and to promote his plan for economic cooperation with the Bolsheviks. He found mistrust of the Soviets so great, however, that he was forced to work through his old political friends, Progressive Republican Senators William E. Borah of Idaho and Hiram Johnson of California. The latter tried to soften the increasingly strident anti-Bolshevism of some of their colleagues.[51]

There was no further Congressional action on Russia that Summer and Fall, during which time United States troops were dispatched. By September, 1918, when the American forces landed in Russia (4500 at Archangel, under British command, and 9000 at Vladivostok under General William S. Graves) a number of realities imposed themselves upon Wilson's fanciful plans.[52]

First, there were no supplies left to guard at Archangel where the Bolsheviki had been overthrown by the Brit-

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[50]Ibid., p. 7557; Kennan, pp. 385-386, note 7, p. 386.

[51]Williams, p. 146; 56 Cong. Rec. 9053-58 (1918).

[52]Kennan, pp. 379, 414; United States Foreign Relations, 1918, Russia, 2:346.

ish in early August, because the Soviets had removed them to the interior. Second, there were no Germans to defend against in north Russia, and so, subject to British command, the Americans were used to chase the Bolsheviks south. Russia was now torn by full-scale civil war, in which the Allies, Czechs and various White factions opposed the Reds who had control over central Russia.[53]

Third, the Japanese, who were pursuing their own interests in the Far East, rapidly escalated their troop strength (to over 70,000 by November) thus alarming Washington. Japanese policies, which were designed to promote unrest in the region, soon came into conflict with American plans to insure the operation of the Trans-Siberian Railway. The American policy, incidentally, worked to the advantage of the White Russians,who depended upon the rail system for their supplies.[54]

Fourth, on November 11, 1918, a scant two months after the Americans landed in Russia, Germany signed an armistice effectively ending the First World War. Thus the Expeditions quickly lost whatever justifications they may have had in terms of an anti-German effort. A new sentiment--isolationism, or withdrawal from the world's strife--arose to compete with anti-Bolshevism.

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[53]Kennan, pp. 419, 424-27.

[54]Unterberger, pp. 105, 231, 117.

Anti-Bolshevism received a shot in the arm when, in the late Summer and Autumn of 1918 the Soviets officially sanctioned a terror campaign to be conducted by the Cheka against suspicious elements of the Russian population. (Actually, the Whites launched an equally bloody reign of terror during the Russian Civil War, but anti-communist propagandists in America played this down.) Furthermore, on September 15 the Administration released the Sisson Documents, purporting to prove that the Bolsheviks were really German agents. (See p. 212, above.)[55]

Anti-Bolshevism was reflected in the Senate resolution offered by King of Utah, which after condemning the Bolsheviks as pro-German traitors called for recognition of the (White) Kolchak government at Omsk and an Allied-American expedition to aid Russia and "overthrow Bolshevist tyranny and anarchy." The proposal never got past the Senate Foreign Relations Committee.[56]

Meanwhile the end of the war was an understandable blow to American troop morale. American soldiers in Russia, who never understood why they were sent there in the first place, grew especially restive after the Armistice. But by this time, the port at Archangel was frozen and the Japanese-American rivalry in the Far East was at its worst. In addition, Wilson wished to consult with the Allies before making

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[55]Chamberlin, 2:66-83; Williams, p. 155.

[56]56 Cong. Rec. 11609 (1918).

any policy changes. As a result, the Russian question was postponed until the Paris Peace Conference was convened in January, 1919.[57]

Wilson was inclined to withdraw from north Russia, balance off the Japanese in Siberia, and leave the general problem of Russia to his proposed League of Nations. But the European Allies were alarmed by the specter of Bolshevism; they feared the spread of communism in the Balkans as a result of the power vacuum created by the defeat of the Central Powers. Churchill, Foch, Clemenceau and elements in the State Department favored crushing the Bolsheviks and dismembering Russia, or establishing a cordon of non-communist states to surround her.[58]

Wilson, spurred on by the War Department and the rising tide of isolationism in the Congress, repeatedly opposed enlarging the intervention, or creating a cordon. He supported Lloyd George's proposal for a conference of the Soviets, Whites and Allies. But the conference, set to be held on the Prinkipo Islands, never came off because Churchill and various French anti-communists undermined it by convinc-

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[57]Leonid I. Strakhovsky, Intervention at Archangel (Princeton, N.J.: Princeton University Press, 1944), pp. 104-105; John M. Thompson, Russia, Bolshevism, and the Versailles Peace (Princeton, N.J.: Princeton University Press, 1966), pp. 49-50, note 39, p. 50.

[58]Thompson, pp. 49-61.

ing the Whites that they need not attend.[59]

On the other hand, Wilson openly supported the White leader, Admiral Kolchak, just short of formal recognition. In addition, he scuttled a secret mission to the Soviets conducted by William C. Bullitt which might have resulted in a modus vivendi with the Bolsheviks. (Lenin was willing at the start of 1919 to agree to "a second Brest," i.e., concessions to buy time.) These acts, hostile to the Soviets, reflected Washington's distaste for Bolshevik extremism, the growth of the Red Scare in America, and the desire to cooperate with the Allies who were alarmed by the communist ascension to power in Hungary and the left-wing Spartacist movement in Germany.[60]

On December 12, 1918, a month after the Armistice, Senator Johnson of California launched a Congressional effort to end the American intervention in Russia. He proposed a resolution calling for all documents bearing on Russo-American relations "so that the Senate and the Nation may know why . . . our soldiers are in Russia." Johnson argued that "what actually exists is war, and yet I know of no declaration of war by the Congress."[61]

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[59]Ibid., pp. 35, 101, 122-24, 145, 375.

[60]Ibid., pp. 164, 235, 307.

[61]57 Cong. Rec. 342-44 (1918).

On December 30 Senator Townsend of Michigan reported hundreds of complaints from relatives and friends of soldiers who had enlisted to fight Germany, but were now being kept in Russia. In the House, Lundeen of Minnesota introduced a resolution instructing the President to withdraw all troops in Russia; this went to the Foreign Affairs Committee on January 4, 1919. Three days later, in a Senate speech, LaFollette of Wisconsin asked why United States armed forces were "making war upon Russia." On January 13, Senator Johnson introduced another measure calling for withdrawal from Russia "as soon as practicable." When it came to a floor vote a month later the Senate split evenly and the Vice-President had to cast the deciding negative vote. Finally, a February 1 House resolution, also sentenced to a committee death, warned the President that he was "without authority of law" to dispatch armed forces "except to protect American lives and property."[62]

Although the Republicans were strengthened after the Congressional elections of November, 1918, a combination of Democratic partisans and militant anti-Bolsheviks helped stem the growing anti-Expedition mood. (The anti-Bolsheviks, led by Senator McCumber of North Dakota, made wild speeches against the "arch-beasts" Lenin and Trotsky who "sold out"

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[62]Ibid., pp. 864, 1060, 1101, 1313, 2544, 2566, 3342.

to Germany. This culminated in the Overman Committee hearings on German and Bolshevik propaganda in the Spring of 1919. These hearings gave some legitimacy to even the most outrageous anti-Bolshevik charges.)[63]

Although the 65th Congress adopted no anti-Expedition measures, Senator Johnson's efforts were not without effect. Wilson considered, then dropped, a plan to fully explain his Siberian policy to Johnson's committee. This was in late January, 1919. On February 18, a letter to the chairman of the Congressional military committees was made public announcing the withdrawal of Americans from north Russia "at the earliest possible moment that weather conditions in the spring will permit."[64]

All American soldiers were evacuated from north Russia by June 30, 1919. But the Administration refused to withdraw from Siberia for fear of the Japanese threat to the Open Door. The 66th Congress bottled up various proposals to force withdrawal from Siberia as well. However, on June 27, 1919, the day before the formal signing of the Treaty of Versailles, the Senate approved another Johnson resolution calling upon the President to "inform the Senate of the

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[63]Williams, p. 164; Schuman, pp. 123-25.

[64]Unterberger, pp. 136-137; United States, Department of State, Foreign Relations of the United States, 1919, Russia (Washington: Government Printing Office, 1937), p. 617.

reasons for sending" and maintaining United States soldiers in Siberia. The President sent a message to the Senate a month later explaining that troops were originally sent to aid the Czechs against enemy P.O.W.'s and to steady Russian efforts at self-defense, but were now necessary to maintain the operation of the Trans-Siberian Railways upon which the Siberian population and Admiral Kolchak are "entirely dependent" for supplies.[65]

Aside from the fact that the White House reiterated the false tale of the German P.O.W. threat, the most glaring aspect of the message is the absence of even a hint of concern over Japan's role. It was not until August 1919 that an Assistant Secretary of State informed a House committee of this angle. By the summer of 1919, isolationist sentiment had surpassed even anti-Bolshevik feeling in America. But more important, Kolchak's White army had suffered major reverses that summer and autumn. And in November of 1919, when Omsk, the Admiral's "capital," fell to the Red Army his defeat was imminent.[66]

Kolchak's collapse and the advance of the Red Army into Siberia where contact with American forces seemed likely was the main factor in the decision to end the Far Eastern Expe-

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[65]Thompson, p. 219; 58 Cong. Rec. 1864 (1919).

[66]Unterberger, pp. 138-40; Chamberlin, 2:191-203.

dition. On December 23, 1919, Secretary of State Lansing wrote the President that "if we do not withdraw we shall have to wage war against the Bolsheviki." On January 9, 1920, Japan was informed that the United States intended to withdraw its men, and by April 1 the last contingent of Americans had sailed away from Valdivostok.[67]

III. The Russian Interventions and the Constitution

At the start of this study we noted a need to answer several questions in order to assess the constitutionality of President Wilson's actions. (See p.206, above.) Were the expeditions aimed at defeating Germany, against which Congress had declared war? In regard to north Russia the answer is yes; in Siberia we can offer a qualified yes at best. This is because we do not know how sincere the United States was when it publicly justified its action on the ground of the German war prisoner threat in Siberia.

On the one hand we know that Washington had contradictory (and more accurate) reports available if the decision-makers had only wished to consult them. On the other hand, war-time confusion and stress was responsible for various errors in judgment based upon faulty factual accounts. For example, the decision on north Russia was predicated upon

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[67]Lansing Papers 2:392-393; Unterberger, pp. 178, 183.

the absolutely false assumptions that the German threat to the region was grave and imminent, and that the Bolsheviki were transferring the Archangel stores to the Germans.

However, if we look beyond intentions, it is clear that the Russian expeditions developed into something far removed from any anti-German effort. They were in fact anti-Bolshevik and anti-Japanese. Thus, troops ostensibly mobilized against the enemy in a declared war ended up being used for an entirely different purpose. Actually, they were used to thwart a professed ally of the United States, Japan, and a major faction in the Russian Civil War, the Bolsheviki.

Hence, even if we grant that the President has the authority to commit troops to a new theater of war pursuant to a Congressional declaration of war, need we grant as well his authority to use those troops for an entirely different purpose, against another enemy once that war ends? Several additional facts should be considered.

Regarding the north Russian affair, Wilson was truly misinformed, and when the Armistice was agreed to in November, 1918, the port was too frozen to evacuate the troops. The next June (1919), following the thaw, the Americans were removed. Nevertheless, while there they did help secure the region against the Red Army, losing 144 men and taking over 300 casualties in the fighting.[68]

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[68]R. Ernest Dupuy and William H. Baumer, The Little Wars of the United States (New York: Hawthorne Books, 1968), p. 190.

In Siberia, by contrast, although American troops remained for one and a half years they did little fighting except for skirmishes against Red bands along the rail line which they were ordered to protect. General Graves, the American commander, was so steadfastly neutral pursuant to his orders that he became the target of much criticism from ardent anti-Bolsheviks in the State Department as well as White Russians. Afterwards Graves wrote as follows.

> The United States never entered into a state of War with Russia, or any faction of Russia. It was equally as unconstitutional to use American troops in hostile action in Siberia against any faction of Russia, as it would have been to {use} . . . them in hostile action against the Russians.

The General went on to deny a New York Times report that his troops were "fighting the Red armies."

> If I had permitted American troops to be used in fighting 'Red armies,' as stated, I would have taken an immense responsibility upon myself, as no one above me, in authority, had given me any such orders. The fact that I did not permit American troops to be so used was responsible for nine-tenths of the criticism directed against us, while in Siberia.[69]

Thus, we are left with the paradox that troops sent to north Russia to defend against Germany were used to fight the Bolsheviki, while the forces sent to aid the Czechs and guard the rail line in Siberia avoided fighting them. Therefore it would seem that the President stood on firm legal ground when

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[69]Graves, p. 93.

he ordered troops to the north, but not when he permitted them to fight the Reds under British command. In contrast, while his authority to send troops to Siberia was doubtful, it could hardly be said that they were engaged in a "war" against the Bolsheviks.

The question of Congressional action is more clear-cut. There is no evidence that Congress participated at all in the decision to dispatch troops. Actually Congress was never told why armed forces were sent to north Russia, and it was not informed of the real policy in Siberia until a year after the troops arrived. Debates in Congress indicate that up until the time when they were so informed supporters of the expeditions assumed they were designed to overthrow the Bolsheviks who were considered to be German agents.

Legislative debates indicate scarcely a challenge to the President's authority, although there were increasing attacks on the wisdom of his Russian policy after the Armistice. The only definitive Congressional action, however, was approval of Hiram Johnson's rather discreet request for information on United States policy in Siberia. Resolutions ordering withdrawal were either defeated or else never came to a floor vote.

The last question concerns the relationship between the United States and Russia in international law. As noted (p. 213, above), the United States considered Russia a war-

ally but refused to recognize the Soviet government. It even went so far as to approve a formal agreement with the renegade regional Soviet at Murmansk on October 14, 1918, and publicly announced its willingness to assist Admiral Kolchak on June 13, 1919. The former, entered into as it was with a regional government, had dubious validity in international law; the latter fell short of de facto recognition.[70]

Thus the United States recognized no government in Russia other than the defunct Kerensky regime, with which it maintained the fiction of "diplomatic relations" for many years.[71] The official American claim of non-interference in Russia's internal affairs rested upon the corresponding legal fiction that the Soviet government did not exist.

How then does this episode affect the war-making powers of the President? It is a precedent for the use of armed forces in a manner inconsistent with, and perhaps intended to be inconsistent with, a prior declaration of war by the Congress. This is partially mitigated by the possibility that the President may have indeed intended to pursue the policy established by Congress (i.e., war against Germany). The historical record is ambiguous here.

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[70] United States Foreign Relations, 1918, Russia, 2:556-57; United States Foreign Relations, 1919, Russia, pp. 378, 386.

[71] Charles G. Fenwick, International Law, 4th ed. (New York: Appleton-Century-Crofts, 1965), p. 192 and note 37, p. 192.

Second, it is a precedent for Presidential decision to use the armed forces without the prior approval of Congress. Again such approval would not be necessary if these forces were intended for use against Germany, the declared enemy.

Finally, (disregarding the original motives), it is an example of the Presidential use of American troops to effect a policy without informing the Congress over an extended period of time of the true aims of the policy. Congress, of course, knew of the anti-Bolshevik nature of United States policy, but because they were not fully informed the legislators gave this factor more weight than it deserved. One historian observed that "Wilson's supporters in Congress . . . knew no more about the policy than did the opposition."[72]

In sum, in the Russian interventions, the President used troops originally deployed pursuant to a Congressional declaration of war in military operations (1) after an armistice ending the war has been agreed to, (2) to aid or thwart various factions of foreign armies involved in the civil war of a third state, (3) without fully informing Congress of the policy aims, and (4) without subsequent formal Congressional approval.

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[72]Unterberger, p. 136.

C H A P T E R V I I

THE KOREAN WAR

I. Background

The mountainous Korean peninsula, which juts out of the Manchurian (Chinese) mainland had been annexed by Japan in 1910 with covert American agreement obtained five years earlier. The fiercely independent Koreans remained part of the Japanese Empire until the end of World War Two. During the War the Allies vowed to liberate them and grant independence "in due course" (Cairo, 1943). Privately, President Roosevelt favored a period of Allied trusteeship.[1]

Actually little thought had been given to tiny Korea, and when Japan capitulated in August 1945, the United States and its ally, the Soviet Union, immediately agreed to divide the peninsula in order to facilitate acceptance of the Japanese surrender. The Russians would operate in the north, the Americans in the south. At the suggestion of a young military officer named Dean Rusk, the 38th parallel,

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[1]Carl Berger, The Korea Knot: A Military-Political History (Philadelphia: University of Pennsylvania Press, 1957), pp. 15, 26-27, 31-37; Soon Sung Cho, Korea in World Politics 1940-1950: An Evaluation of American Responsibility (Berkley: University of California Press, 1967), pp. 16-23.

running across the middle of the country was adopted as a dividing line.[2]

Although unprepared for occupation, Lieutenant General John R. Hodge landed the first 72,000 Americans in the south Korean zone in September 1945. Hodge received orders from General Douglas MacArthur in Tokyo, Commander in Chief Far East and Supreme Commander Allied Powers. The Russians had already placed an estimated 125,000 men north of the 38th parallel.[3]

The Americans almost immediately alienated the Koreans by keeping on the hated Japanese civil servants and by insisting that the United States military was the sole governing authority in its zone. By contrast, the better-informed Russians expropriated the Japanese and let indigenous administrative organizations function, while placing Soviet-trained Korean communists returning from the Russian Far East into positions of power.[4]

Realizing that the division of the country was unnatural, unpopular and economically disastrous, the United States sought Soviet cooperation in replacing the zonal arrangement with a trusteeship. An agreement was worked out

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[2]Cho, pp. 53-55; Dean Acheson, Present at the Creation: My Years in the State Department (New York: W. W. Norton and Company, A Signet Book, 1969), p. 581.

[3]Cho, pp. 62-63, note 5, p. 63.

[4]Ibid., pp. 61-62, 68-70, 79, 81-82, 88.

in Moscow in late December 1945 calling for a four-power trusteeship of five years' duration and a provisional Korean government, all to be implemented by a joint Soviet-American Commission.[5]

Meeting on and off from January 1946 through the summer of 1947, the Joint Commission accomplished next to nothing principally because the Americans and the Russians were unable to agree on the Korean groups to be consulted. The Russians were of course partial to communists and leftists, the Americans to moderates. It was gradually becoming clear that both sides preferred two Koreas rather than one wholly communist or anti-communist nation.[6]

Throughout 1946-1947, the situation in the south deteriorated. Long-time nationalist Syngman Rhee organized right-wing factions against trusteeship, favoring instead immediate independence. Leftists staged frequent revolts which Hodge openly suppressed. Inflation raged. The United States sought a way out without compromising its newly adopted (spring 1947) policy of containing Communism.[7]

After a fact-finding mission in the summer of 1947, General Albert C. Wedemeyer recommended building up a south Korean army and arranging with the Union of Soviet

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[5]Ibid., pp. 92-95, 100-103.

[6]Ibid., pp. 119, 123, 146-50.

[7]Ibid., pp. 106, 133, 152, 165, 193.

Socialist Republics for mutual troop withdrawals. In September 1947 the Joint Chiefs of Staff advised President Truman that from a "military security" standpoint the United States has "little strategic interest" in maintaining ground troops in Korea, unless as a consequence of withdrawal, "the Soviets establish military strength in south Korea capable of mounting an assault on Japan."[8]

The United States therefore undertook to establish an independent south Korea with United Nations support. In the north the pro-Soviet communists, led by Kim Il-sung had already solidified their power in 1946 with the aid of Russian advisors. They undertook popular land reform, and thus laid the groundwork for a stable communist state. The contrast with the chaotic southern zone embarrassed the United States.[9]

In the fall of 1947, the United States brought the Korean question to the United Nations, which America dominated. Over Soviet objections and refusal to participate, the United Nations General Assembly approved establishing a Temporary Commission (UNTCOK) to oversee nationwide elections (November 1947). The Soviets countered (unsuccessfully) with a proposal for simultaneous withdrawal of

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[8]Harry S. Truman, Memoirs, vol. 2: Years of Trial and Hope (New York: Doubleday and Company, 1956), pp. 325-326.

[9]Cho, pp. 127-31, 166.

all foreign troops. It was embarrassing for the United States to reject the popular Russian resolution, but there was reluctance to withdraw until a native army was developed in the south.[10]

Barred from the north, UNTCOK's thirty observers watched over elections in the American zone, May 10, 1948. Rhee's party gained a plurality; a constitution was adopted in July, and in that month the Assembly chose Rhee President of the Republic of Korea (ROK). Meanwhile the north Koreans conducted a purge, prepared a constitution and held elections of their own, thus establishing the Democratic People's Republic of Korea (DPRK). As of September 1948, there were two Koreas.[11]

The Democratic People's Republic of Korea then invited all foreign troops to leave the peninsula. The Union of Soviet Socialist Republics accepted, withdrawing by the end of December 1948, though leaving behind advisors and pro-Soviet Koreans in all major positions of power. In March 1949, the National Security Council recommended complete United States evacuation by the end of June of that year, except for a five hundred-man military advisory

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[10] Ibid., pp. 180-181.

[11] Ibid., pp. 208-12; Joyce Kolko and Gabriel Kolko, The Limits of Power: The World and United States Foreign Policy, 1945-1954 (New York: Harper and Row Publishers, Inc., 1972), pp. 297-298.

group, and military aid for the Republic of Korea for fiscal 1950. President Truman approved.[12]

The Republic of Korea army was built up, although inadequately supplied, from 18-20,000 men in the spring of 1948 to 98,000 at the outbreak of the war two years later. Offensive weapons, i.e., tanks, heavy artillery, fighter planes, were withheld. In response to the President's request in June 1949, $150 million in economic aid was granted. But in January 1950 the House defeated by a narrow margin a request for a $60 million supplement. However, Congress passed the measure a month later when it was tied in with aid to Formosa. Finally, as part of the United States communist containment policy, Korea was granted over $10.9 million in March 1950, almost none of which had arrived when the war broke out.[13]

Congressional reluctance to aid Korea could be traced to: (1) dissatisfaction with the Administration's China policy, i.e., refusal to help Chiang Kai-shek regain mainland China where he had lost all power by 1949; (2) partisan politics, viz., the bulk of the opposition was Republican; (3) fiscal conservatism; and (4) fear that

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[12] Cho, pp. 213-214, 233-234.

[13] Ibid., pp. 249, 251, 253-254; Kolko, p. 558; Truman, p. 329; Glenn D. Paige, The Korean Decision (New York: The Free Press, 1968), pp. 35, 70.

the aid would end up in communist hands anyway when the shaky Republic of Korea collapsed.[14]

Less is known about Russian aid to the Democratic People's Republic of Korea. By June 1950, their army had been built up to over 135,000, including 16,000 veterans of Chinese Communist or Soviet campaigns. They had had a large number of Soviet military advisors, and were supplied with planes, tanks and heavy artillery. Thus, they were both better trained and better equipped than the South Koreans. In his memoirs, Nikita Krushchev declares that Kim Il-sung initiated the idea of attacking South Korea at a meeting with Stalin in Moscow in late 1949. Although Stalin reportedly "had his doubts," he encouraged Kim, hoping a swift victory would preclude United States intervention. At the last minute, Stalin withdrew the Soviet advisors, fearing that their capture would provide evidence of Russian participation.[15]

Meanwhile, the Cold War received new impetus as Americans were shocked to learn that the Union of Soviet Socialist Republics exploded an atom bomb in August 1949.

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[14]Cho, pp. 241-242; Paige, pp. 35-36, 68; Kolko, p. 569.

[15]Cho, pp. 255-57; Edward Crankshaw, Krushchev Remembers (Boston: Little, Brown and Co., 1970), pp. 367-70; Allen S. Whiting, China Crosses the Yalu: The Decision to Enter the Korean War (New York: The Macmillan Co., 1960), p. 38.

Two months later the Chinese communists proclaimed their People's Republic. In a speech to the National Press Club on January 12, 1950, Secretary of State Dean Acheson tried to explain Chiang Kai-shek's collapse and the United States' refusal to alienate China by aiding the Nationalists.

Acheson went on to describe the United States "defensive perimeter" in the Pacific, including the Philippines and Japan, but excluding both Formosa and Korea. This was a reiteration of a position taken by General MacArthur in 1949. Pacific areas outside the defense perimeter, Acheson said, cannot be guaranteed against attack; if invaded they must rely first upon their own ability to resist, and then upon the United Nations.[16]

The sense of United States ambivalence regarding South Korea's defense was heightened by the comment of Senator Tom Connally (D-Tex.), chairman of the Senate Foreign Relations Committee and an unofficial spokesman for the Truman administration. Connally told an interviewer in May 1950 he was afraid that the United States would have to seriously consider abandoning Korea because Russia was in a position to "overrun" her and Formosa "when she gets ready to do it."[17]

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[16]Paige, pp. 57, 67; Acheson, pp. 463-66; Cho, pp. 259-260.

[17]Paige, p. 68.

The Democrats' Far East Policy and the people who made it came under increasingly emotional attack in early 1950. Former State Department employee Alger Hiss was convicted for perjuring himself when he denied passing government papers to the Soviet Union. Hiss' conviction in late January was followed by Senator Joseph R. McCarthy's (R-Wis.) charge that the State Department employed communists. Later McCarthy added that the Department's "softness" on communism caused the "loss" of China.[18]

While the Administration publicly defended itself against McCarthy and the "China lobby," it was privately developing a major new defense policy, NSC-68, which was premised upon global threat presented by the Soviet Union. NSC-68 would require defense budget increases three to four times current levels.[19]

It was in this atmosphere of intensifying Soviet-American hostility, and increasing polarization between Congressional Republicans and the Democratic administration that North Korea attacked across the 38th parallel, June 24, 1950, Washington time.

II. The Korean War

United States Ambassador John J. Muccio's cable, which concluded that an "all-out offensive against the

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[18]Acheson, pp. 469-74; Paige, pp. 37-41.

[19]Acheson, pp. 488-92; Paige, pp. 58-61.

Republic of Korea" had been launched, caught Washington by surprise. Spring intelligence reports of a possible invasion had been discounted either because they were contradictory or because they had heretofore cried wolf too often. Furthermore, the State Department, which immediately viewed the attack as an example of "Soviet probing," had expected the challenge to come first in areas other than Korea.[20]

It was immediately decided to work through the United Nations by requesting an emergency session of the Security Council. The Soviet Union had been boycotting the Council since January 1950, condemning its actions as illegal as long as the Nationalists rather than the Communists occupied China's seat there. Without a Soviet veto, the Council was to become a weapon of American diplomacy--leading some historians to view the boycott as a major Russian blunder, others to see proof that the Democratic People's Republic of Korea acted rather independently.[21]

Following President Truman's approval, the United Nations Security Council resolved on June 25 that "forces

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[20]Paige, pp. 91, 97-98; John W. Spanier, The Truman-MacArthur Controversy and the Korean War (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1959), pp. 21-22; Acheson, p. 527.

[21]Paige, pp. 92-93; Acheson, pp. 466, 525; Whiting, p. 39, note 10, p. 182; I. F. Stone, The Hidden History of the Korean War (New York: Monthly Review Press, 1969), p. 66.

from North Korea" had committed a "breach of the peace" against the Republic of Korea. It called for a "cessation of hostilities," a withdrawal of northern forces to the 38th, and the assistance of all members in executing the above while refraining from aiding the North.[22]

That evening, (June 25), President Truman met at Blair House with State and Defense Department officials and the Joint Chiefs of Staff. The "common conviction" was that this was aggression analogous to pre-World War Two instances. Truman later recalled thinking on the plane to Washington earlier that day that "Communism was acting in Korea just as Hitler, Mussolini and the Japanese had acted . . .," and if unchallenged, Communist leaders "would be emboldened."[23]

At the conference most of Secretary Acheson's proposals were adopted. A crash program of military aid over and above Congressional authorization, air cover for the evacuation of American civilians, and the despatch of the Seventh Fleet toward the region were approved. The conferees "had no doubt whatever" that the Soviet Union was behind this whole affair.[24]

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[22]Leland M. Goodrich, Korea: A Study of United States Policy in the United Nations (New York: Council on Foreign Relations, 1956; reprint ed., New York: Krauss Reprint Co., 1972), pp. 221-222.

[23]Truman, p. 333; Paige, p. 137.

[24]Paige, pp. 127, 132, 137-40.

The next morning, Monday, June 26, the Defense and State Department Secretaries, scheduled to testify before a Senate committee regarding the Far East, did so, but refused to discuss possible courses of action in Korea. At the same time Senator Tom Connally was assuring President Truman, at the White House, that he had the authority to commit American forces in Korea without prior Congressional consent. Connally recalled comparing the situation to that of a burglar entering your house; you can shoot him, he claims to have told the President, without going to the police station for permission. He then added that a "'long debate in Congress'" might "'tie your hands completely. You have the right to do it as Commander-in-Chief and under the United Nations Charter.'"[25]

Shortly before noon the President issued his first public statement. It promised vigorous support of the United Nations resolution and a step-up in aid to Korea, and closed by warning "those responsible for this act of aggression" that the United States views such threats to world peace "seriously."[26]

In the Congress that Monday afternoon, the Republicans continued their attacks against the State Department, adding a warning against indecisiveness in

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[25]Ibid., pp. 146-147, 149.

[26]Ibid., pp. 149-150.

Korea. In the evening, at a second Blair House meeting, an alarming cable from General MacArthur was read. It said that North Korean tanks were entering the suburbs of Seoul, the Republic of Korea capital; that the situation was "rapidly deteriorating," and that "a complete collapse is imminent."[27]

Once again the Blair group adopted Acheson's proposals. This time there would be full naval and air support for the South Koreans limited to the area south of the 38th parallel. The Seventh Fleet would be interposed between Formosa and mainland China to prevent a new outbreak of fighting between the Nationalists and Communists. This was intended to confine the area of conflict to Korea, but it meant the end of United States noninvolvement in the Chinese civil war. It also abrogated Mao Tse-tung's plans to conquer the island in 1950. Finally, United States forces on the Philippines were to be strengthened, a military mission was to go to Indochina, and both areas would receive increased aid.[28]

General MacArthur received orders to commit United States air and naval forces to Korea at his headquarters in Tokyo. The President telephoned Senator Connally to inform him, but it was not until the following morning (June 27)

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[27] Ibid., pp. 151-54; Truman, p. 337.

[28] Paige, pp. 161-79; Whiting, p. 22.

that Truman met with fourteen Congressmen, including five Republicans, whom he had selected. Upon Acheson's advice, it was decided not to seek a joint resolution of support from the Congress in order to avoid partisan criticism or general discussion of the costs or consequences of intervention.[29]

Truman read the Congressmen his soon-to-be-released public statement, told them there were no plans to commit ground troops, and received their support. His statement noted the Security Council resolution, condemned "Communism" for going beyond subversion to armed force in order to conquer, and declared:

> I have ordered United States air and sea forces to give the Korean Government troops cover and support.[30]

In the Congress that day there was general support for Truman's action, although Republican Senators Kem (Missouri) and Watkins (Utah) questioned his authority to act without Congressional approval. Senator Morse (R-Ore.) defended the "broad powers" of the President as Commander-in-Chief. On the House side, only Representative Marcantonio of New York, a member of the left-wing American Labor Party, accused the President of usurping the war-making power with Congressional acquiescence; he denied

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[29]Paige, pp. 181-182, 187.

[30]Paige, pp. 188-91; Truman, pp. 338-339.

that the United Nations Charter provided adequate authority. The House then approved the controversial peace-time extension of the draft.[31]

Finally, in the afternoon (of June 27), with the Soviets still absent, the Security Council approved a second resolution on Korea. Noting non-compliance with its earlier request, the Council then recommended:

> that Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.[32]

Of course the United States, as the Russians later took pains to point out, had already begun its "assistance."

On Wednesday, June 28, response to the Administration's action continued to be, as one analyst concludes, "overwhelmingly favorable." That same day, Washington time, General MacArthur, on his own initiative, authorized air strikes against military targets north of the 38th parallel. In the Senate, the leader of the conservative wing of the Republican Party, Robert Taft of Ohio, attacked the Administration on constitutional grounds.[33]

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[31]Paige, pp. 196-200; 96 Cong. Rec. 9228-9229, 9231, 9233, 9268 (1950).

[32]Paige, pp. 204-205.

[33]Ibid., pp. 212-213, 230, 216.

Taft said he supported intervention in Korea, and would vote for a joint resolution to that effect if offered. But, he charged, there has been "no pretense" of consulting Congress, and so the President lacks legal authority. The President has brought about "a de facto war with the Government of northern Korea . . . without consulting Congress and without congressional approval." Although "Presidents have . . intervened with . . forces to protect American lives or interests . . I do not think it has been claimed that . . . the President has any right to precipitate any open warfare."

As for the United Nations Charter, a special agreement, subject to legislative approval must be negotiated with the Security Council before the United States could be obligated to supply troops, Taft reasoned. Therefore the Charter could not provide the President with authority. Thus, he concluded, if the legislature does not protest Truman's action it will have "finally terminated for all time the right of Congress to declare war . . ."[34]

Majority leader Lucas of Illinois then rose to defend the President's right to act as Commander-in-Chief given the threat of Communism to United States security. His action, said Lucas, "was within the traditions and

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[34]96 Cong. Rec. 9320, 9322, 9323 (1950).

precedents . . established more than a hundred times" in United States history. But Lucas went on to agree "wholeheartedly" with Senator Flanders of Vermont who suggested lack of authority to pursue the war north of the 38th.[35]

No one in Washington knew that MacArthur had already ordered air strikes on North Korea. While the Senate went on to extend the draft, 76-0, MacArthur was completing a personal tour of Korea convinced that American combat troops were needed.[36]

One June 29, while Democratic Senators Humphrey of Minnesota and Gillette of Iowa defended the President during the day, the National Security Council, which includes the President, secretly moved the United States closer to full intervention that evening. Working from Defense Secretary Louis A. Johnson's proposals, a directive was prepared for MacArthur. The instructions called for the use of American ground forces in the rear to establish a beachhead at Pusan, on the southeast tip of the peninsula. Second, "fullest possible" naval and air support for Republic of Korea forces, including air strikes against military targets in the north were authorized. Finally, MacArthur was cautioned to "stay well clear" of the

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[35]Ibid., pp. 9328-9239.

[36]Paige, pp. 219, 236-38.

Democratic People's Republic of Korea's northern borders with Manchuria and the Union of Soviet Socialist Republics.[37]

In the wee hours of the morning of the 30th, MacArthur's urgent request for American combat troops arrived at the Pentagon. He wanted a regimental combat team at the front line, with an eventual build-up to two army divisions. Truman approved the combat regiment from his bedside telephone. But after a morning conference with his advisors, the President gave MacArthur authority to use whatever troops were available to him at his discretion.[38]

That same morning the Administration held a briefing for fifteen Congressional leaders, including seven Republicans. After the President told of his decision to commit ground troops, one legislator, Senator Wherry (R-Neb.), minority floor leader, objected to the lack of consultation with Congress. But he was the only legislator to voice criticism. Before the briefing ended a press statement was released, announcing the meeting with the Congressmen, and the decision to use air and naval forces against North Korea. The statement concluded:

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[37] 96 Cong. Rec. 9455, 9462 (1950); Paige, pp. 244-51.

[38] Paige, pp. 253-56, 260.

General MacArthur has been authorized to use certain supporting ground units.

Neither the legislators nor the public was informed of plans to use the Army in combat in Korea.[39]

On Capitol Hill that afternoon (June 30), Senators Wherry and Cain (R-Wash.) complained about inadequate consultation with Congress. Wherry suggested that the President address a joint session of Congress. He denied that the United Nations Charter modified the legislative power to declare war, and disputed that this action was analogous to past Presidential efforts to protect American lives and property abroad. Nevertheless, Wherry called for "unanimous support" for Truman's decision.

Senator Knowland (R-Cal.) argued that Presidential authority "to take the necessary police action" was undisputed, and a Congressional declaration of war was neither "required" nor "desirable."

Senator Flanders (R-Vt.) announced he now doubted the wisdom of his statement of June 28, in which he denied that United States forces could be given authority to pursue the enemy or conduct air strikes in North Korea. However, while the President's authority "to initiate military action . . . has been tacitly recognized for generations and . . has been exercised more than once," Flanders cautioned, the world is now much too "inflammable" for the

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[39] Ibid., pp. 262-64.

Chief Executive to take that responsibility upon himself. Nevertheless, it was necessary to resist aggression in order to preserve the United Nations.[40]

The Senate then approved, 66-30, over $1.2 billion for mutual defense aid for United States allies, including $16 million for Korea and the Philippines. Senator Taft voted for the measure which had provisions allowing the President to divert $100 million to Korea if he so desired. In September 1950, this defense aid would be supplemented by an additional $4 billion.[41]

By the end of June 1950, the North Korean army had overrun all but the southeastern tip of the country, destroying half the Republic of Korea army in the process. A rapid American troop buildup at Pusan (to 65,000 men by August) enabled the United Nations Command, as it was formally known, to hold on to a small piece of the peninsula. But with their supply lines stretched to the breaking point the Communist offensive was halted. On September 15, MacArthur launched an amphibious landing at Inchon, on the west coast near Seoul, well behind enemy lines. This

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[40] 96 Cong. Rec. 9526, 9537-41 (1950).

[41] Paige, p. 267; Acheson, p. 547; Joint Resolution making temporary appropriation. 64 Stat. 302 (1950); an act making supplemental appropriations. 64 Stat. 1044 (1950).

maneuver ended in a complete rout of the North Koreans.[42]

The Inchon landing was a turning point in the conflict in a number of respects. It shattered Kim Il-sung's effort to unite Korea, and began Syngman Rhee's drive to do the same. It strengthened the hand of General MacArthur who was increasingly at odds with the Administration's policy of limiting the conflict to Korea. Finally, it alarmed Communist China, which saw a unified anti-communist Korea as a threat to its interests.[43]

In fact, both the Administration and the communist Chinese were perturbed by MacArthur, who made public statements urging United States efforts to promote Chiang Kai-shek's reconquest of the mainland. The charismatic General was a force in his own right: virtual dictator of post-war Japan, popular at home, in charge of all United States-United Nations military operations in the Far East, and now lending his prestige to the Republican policy position on Asia.

The Congress in the summer of 1950 probably reflected an August Roper poll which showed 73% approval

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[42]David Rees, Korea: The Limited War (New York: St. Martin's Press, 1964), p. 36; Truman, p. 358; Robert Leckie, Conflict: The History of the Korean War 1950-53 (New York: G. P. Putnam's Sons, 1962), pp. 105-106, 125-53.

[43]Spanier, p. 83; Whiting, p. 88.

of Truman's decision to intervene; 15% disapproved, 12% had no opinion. On July 5, Senator Douglas (D-Ill.) defended the President's action on constitutional grounds. Douglas reasoned that the Framers of the Constitution "did not want to tie our country's hands by requiring congressional assent for all employment of armed force."

Furthermore, Douglas contended, the speed of contemporary warfare and the delays permitted by Congressional procedure make it "unwise to insist that the President cannot use armed force in advance of formal congressional approval." In the case of Korea, the Congress "overwhelmingly approved" the President's action when it extended the draft and increased military aid.

Third, Douglas cited fifteen leading instances where armed force was used without a declaration of war, and although he admitted that "the vast majority" were unlike Korea in that they involved protection against "direct" threats to American lives and property, the "indirect" threat to United States security from unhindered Communist aggression makes the President's decision consistent with constitutional theory and practice.

Fourth, Douglas noted situations where the "wholesale and widespread use of force" implied by a declaration of war would be inappropriate. On such occasions, as with Korea, the President should be able to use force without a formal congressional declaration of war.

Finally, although such discretionary Presidential powers may be abused, the "sobering and terrible responsibilities of the office" and the threat of impeachment should serve as deterrents.[44]

On July 10, Senator Wiley (R-Wis.) entered into the Record a statement urging that the Administration submit for approval by both Houses a resolution "drawing a defense line beyond which we will not permit Russian and Red satellite aggression." Wiley argued that prior instances of troop use without Congressional approval do not apply in the Korean situation, where the conflict could spread to other areas. Given such a possibility "it is ridiculous" for Congress to take no action.

Wiley noted the erosion of Congressional power and the growth in the executive, and suggested that if the Congress did not act on Korea it would increase public concern over legislative "strength and validity." The Senator found Presidential consultations with a few members of Congress inadequate, and although he admitted approving the President's actions, he felt the whole Congress should approve "for the sake of history . . and for . . . the integrity of the legislative branch."

Finally, Wiley urged that a resolution was neither too late nor "a precedent for the executive to initiate

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[44]Paige, p. 270, note 65; 96 Cong. Rec. 9647-49 (1950).

action, getting congressional agreement later." Where the President acts alone as Commander-in-Chief, or under the jurisdiction of the United Nations, and the action is "more than the mere utilization of police force . . . the Congress should also authorize" the use of the military. Even if Korea were the only battlefield, Wiley concluded, "I don't want the American people to feel that our men will be dying . . merely at the order of one single man."[45]

Needless to say, the Administration's supporters in Congress had no intention of submitting such a resolution. During July there were a few other timid suggestions that the President acted unconstitutionally in bypassing the Congress, but Republican Congressman Hugh Scott of Pennsylvania spoke in opposition to this contention. The Eighty-first Congress passed into oblivion in silent approval.[46]

After the success at Inchon on September 15, the United States would have to decide how far to pursue the war, i.e., whether or not to cross the 38th parallel. Actually, the National Security Council had decided on September 1--before Inchon--that MacArthur should conduct

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[45] 96 Cong. Rec. 9737 (1950).

[46] Ibid., pp. 9960, A4986, A4901.

military operations in North Korea. Counsellor George Kennan of the State Department opposed.[47]

On September 15, the day of the Inchon landing, MacArthur was told that while final decisions could not yet be made, the United Nations had "a legal basis for conducting operations north of the thirty-eight parallel." On the 27th, he was instructed to destroy the North Korean army by conducting operations north of the 38th, "provided that at the time of such operations" the Soviets or Chinese Communists have not entered or threatened to enter North Korea in force. MacArthur was then cautioned to permit only Korean ground troops to near the northern border with Manchuria and the Union of Soviet Socialists Republics. He was also prohibited from taking air or naval action against China and the Soviet Union.[48]

The Communist Chinese increased their armed forces on the Manchurian-Korea border from 180,000 in mid-July to 320,000 in October. On October 3, Chou En-lai warned Washington via India's ambassador in Peking, that if United States troops entered the Democratic People's

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[47]Acheson, pp. 584-585.

[48]U. S., Congress, Senate, Military Situation in the Far East, Hearings Before the Committee on Armed Services and Committee on Foreign Relations to Conduct an Inquiry into the Military Situation in the Far East and the Facts Surrounding the Relief of General of the Army Douglas MacArthur from His Assignments in That Area, 82d Cong., 1st Sess., 1951, p. 718; Acheson, p. 586.

Republic of Korea, China would intervene. This was discounted by the State Department as part of a diplomatic effort to save the North rather than a military threat.[49]

In short, in the wake of Inchon, Washington sensed complete victory throughout Korea, and would not be deterred by anything less than a forceful Soviet response. This attitude was reflected in America's United Nations posture. On September 20, Secretary of State Acheson presented his "Uniting for Peace" speech, designed to bypass the Security Council to which the Soviet Union with its veto power had returned in August. On September 30, Washington's Ambassador to the United Nations called the 38th parallel an "artificial barrier," without basis "either in law or in reason." And on October 7, 1950, the General Assembly recommended that:

> (a) All appropriate steps be taken to ensure conditions of stability throughout Korea; (b) All constituent acts be taken . . . under the auspices of the United Nations, for the establishment of a unified, independent and democratic government in the sovereign State of Korea. . . .[50]

On October 9, MacArthur was told that if the Chinese intervened "anywhere in Korea," he was to continue operations as long as they offered "a reasonable chance of success." Within a week the first Chinese troops secretly

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[49] Whiting, p. 111; Truman, pp. 361-362; Acheson, pp. 585-586.

[50] Acheson, p. 583; Goodrich, pp. 131, 224.

crossed the Yalu River, boundary between Korea and China. United States troops had crossed the Parallel the day the General Assembly recommendation was passed.[51]

Although United Nations forces surged north, taking Pyongyang, the capital of the Democratic People's Republic of Korea on October 19, and Chinese forces crept south of the Yalu, there was no major battle contact until late November. During the lull the President met MacArthur on Wake Island, October 15, where he insists the General assured him that the fighting would be over by Thanksgiving.[52]

On his drive to the Yalu, MacArthur was determined to carry out the United Nations recommendations ("a united, independent and democratic," i.e., a unified, anti-communist, Korea) by force, despite the risks of wider war. The Administration did not reject the goal, but it was unwilling to risk as much as the General in order to attain it. Underlying this strategic dispute was the broader foreign policy question of whether or not the United States had greater interests in Asia or in Europe. The Administration, influenced by Acheson's State Department, and the General, backed by the Republicans in Congress, never could agree on this issue.

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[51] Truman, p. 362; Whiting, p. 115; Rees, p. 108.

[52] Rees, p. 123; Truman, pp. 365-366.

During the fighting lull, from October to late November 1950, an indecisive Washington allowed MacArthur to bomb bridges across the Yalu and begin an "end the war" offensive to gain control of all Korea up to that river boundary.[53]

On November 25, 1950, the Communist Chinese launched a major counteroffensive that would prove the second crucial turning point in the war. After suffering heavy losses the United Nations forces began a retreat which resulted in communist control of all of North Korea to the 38th parallel by Christmas. MacArthur announced on November 28: "We face an entirely new war."[54]

Chinese entry into the war compelled Washington to either escalate its efforts to obtain a unified, non-communist Korea, or abandon this as a war aim. The Far Eastern Commander did everything he could to convince the Administration to carry the war to China. He repeatedly urged bombing, blockading and permitting Nationalist attacks on the mainland. Washington rejected all these suggestions for fear of war with the Soviet Union and of undermining its commitment to the defense of Europe.

MacArthur carried on his campaign to widen the war throughout the winter of 1950-1951, even issuing public

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[53]Acheson, pp. 597-604.

[54]Rees, pp. 155-66.

statements designed to alter Administration policy. This culminated in the General's dismissal on April 11, 1950.[55]

Shortly after the Chinese intervened President Truman considered then rejected the idea of addressing a special session of Congress, presumably to get support for his Korean policy in the wake of changed circumstances of the war. Instead Truman issued a public statement calling for an increase in the size of the armed forces. He then met with twenty-one Congressmen, briefed them on Korean developments and urged them to pass supplementary defense appropriations.[56]

Twelve days later, December 13, he met another group of Congressmen and told them he was going to proclaim a state of emergency which would enable the President to rapidly mobilize the armed forces. Senator Taft questioned the need for such a declaration, as did Senator Wherry, who suggested that Truman ask the Congress for whatever authority he thinks he needs. Representatives McCormack and Vinson and Senator Connally supported the idea, and in Truman's account, the others present either gave qualified support or were silent. On December 15,

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[55]Spanier, chaps. 8-10; Truman, chaps. 26-27; Acheson, chaps. 49, 53-54; MacArthur Hearings, passim.

[56]Truman, pp. 388-91.

the President announced on the air that he would declare a national emergency the following morning.[57]

The emergency was not only in response to Chinese intervention in Korea, but to what the Administration perceived as an increased global threat from the Soviet Union. Korea was considered a Soviet diversionary effort, designed to "dissipate" American strength and "divide us from our [European] allies." Accordingly, on December 19, 1950, Truman announced that more United States ground troops would be sent to Europe for NATO.[58]

This touched off a "Great Debate" in the Senate in which the Asia-firsters, led by Senator Taft, challenged both the wisdom and the constitutionality of the President's troops-to-Europe order. We will concentrate only on the constitutional challenge as it pertains to Korea, or to the more general question of the President's authority to despatch troops to engage in hostilities.

Bolstered by Republican gains in the November 1950 Congressional elections, the Eighty-second Congress launched its attack against the Truman-Acheson foreign policies on January 5, 1951, with a speech by Senator Taft. Taft declared that the President "had no authority whatever

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[57]Ibid., pp. 420-28.

[58]Truman, pp. 419-21; Rees, p. 172.

to commit American troops to Korea without consulting Congress and without Congressional approval." The Senator then added:

> The President simply usurped authority, in violation of the laws and the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war. It may now be argued, of course, that Congress by appropriating money for additional Korean action has ratified the act, but the war was on, and we had no choice but to back up wholeheartedly the boys who were fighting in Korea.[59]

On January 11, Senator Connally defended the President's constitutional authority to send troops to Korea and Europe, or, in fact, "to any part of the world if the security and safety of the United States are involved." Connally noted the view of President Taft, the Senator's father, and the over "100 occasions" when the Commander-in-Chief had sent troops without prior Congressional approval.[60]

Five days later a Walter Lippmann article was inserted into the Record by Senator Ives of New York. Lippmann urged the President to consult with Congress before sending troops to Europe, and noted that while Truman "had a right to intervene [in Korea] without the prior approval of Congress," he should have sought subsequent legislative support.[61]

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[59]Rees, p. 197; 97 Cong. Rec. 57 (1951).

[60]96 Cong. Rec. 142 (1951).

[61]Ibid., pp. 313-314.

On January 19, 1951, the House resolved that it was the "sense" of that chamber "that the United Nations should immediately . . declare the Chinese Communist authorities an aggressor in Korea." The Senate passed a parallel measure on the 23rd.[62]

On January 22, Senator Kem (R-Mo.) referred to the "undeclared war in Korea, one of the most tragic episodes in American history," as an example "of the President arrogating to himself powers that are not constitutionally his" because he did not consult with Congress. Congress still "has not recognized what must be apparent to everyone--that a state of war exists. This is government by a man," insisted Kem, "not by the Constitution."[63]

Senator Ferguson (R-Mich.) then rose to read a prepared statement on the constitutional authority of the President. He concluded that while the Framers of the Constitution never intended to allow the President to send troops overseas, in light of historical precedent and judicial decisions, the power of the President to so act without Congressional authority "must remain open in 1951."[64]

But Senator Watkins (R-Utah) found the historical precedents "clearly distinguishable" from the Korean

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[62]Ibid., pp. 457-64, 558.

[63]Ibid., pp. 486-487.

[64]Ibid., pp. 524-27.

intervention, since the former were intended to protect American citizens and their property abroad, or to pursue lawless elements, or to defend the national honor by sending marines ashore. Taft seconded Watkins' view of the precedents on February 8, adding that "in no case had it been maintained that the President can even involve this country in war unless it is attacked."[65]

Taft went on to note that while it was difficult to stop the President from sending the Army where he will, "[t]his argument only goes to his power, not to his right."[66]

On February 28, 1951, the Senate Foreign Relations and Armed Services Committees jointly published a pamphlet entitled, "Powers of the President to Send the Armed Forces Outside the United States." The analysis, which was prepared by the Executive Branch, justified the President's actions in Korea on the basis of Article 39 of the United Nations Charter, but added that the President had authority to use troops "irrespective of the Charter," under his general constitutional authority "to carry out the foreign policy of the United States."[67]

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[65]Ibid., pp. 515, 1118-1119.

[66]Ibid., p. 1120.

[67]U. S., Congress, Senate, Powers of the President to Send the Armed Forces Outside the United States, Prepared for the Use of the Joint Committee Made Up of the Committee on Foreign Relations, and the Committee on Armed Services, 82d Cong., 1st sess., 1951, pp. 21-25.

One month later, Taft attacked this document in a lengthy Senate speech. He charged that it made "the most unbridled claims" for Presidential authority he had ever seen in print, and that it presented "an utterly false view of the Constitution." With regard to sending troops to Korea, this was clearly a "usurpation of authority." One limitation on the President's power to send troops abroad "admitted by every responsible authority," insisted Taft, is that he cannot do so if the sending "amounts to the making of war."

Korea was a clear violation of this principle, Taft contended, "because the war had actually begun, and the sending of troops . . was the distinct entrance into a real war." Taft then denied that there was any treaty obligation to Korea, and added that without Congressional assent, "nothing in the United Nations Charter authorized the intervention." A statement of Professor Edward S. Corwin in support of this latter contention was then inserted.

> I agree with Senator Taft that our invocation of the United Nations Charter in support of the Korean business is totally phony . . . As the Korean operation took on the dimensions of war from the beginning, the Constitution required that Congress should be consulted.[68]

On March 22, Taft had said on the Senate floor that the President could not send troops "to a country such as

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[68] 97 Cong. Rec. 2988-93 (1951).

Korea when that country is under attack, and when, therefore, the sending of troops clearly involves us in a war." To which Senator Benton (D-Conn.) retorted that the armed forces "are an instrument of our foreign policy" and he thought it strange that the President could dispatch them to "friendly countries such as France and England" but lacked the power to use them in riskier circumstances when decisive action might avoid war. Benton said that the Korean action was taken for the "common defense," words of the Preamble to the Constitution.

Senator Knowland (R-Cal.) then rose to attack Benton's argument as establishing "unlimited Presidential power to involve the country in war." But Senator Humphrey (D-Minn.) pointed out that the President has certain inherent powers in foreign affairs that stem not only from the Constitution. Senator Case (R-S. Dak.) wanted to know if the President intervened in Korea under his authority as Commander-in-Chief, or under the authority of the United Nations. Kem of Missouri pointed out that Truman acted before the Security Council had, but Benton said he was merely anticipating by a few hours.[69]

As the Great Debate continued, so did the comments on Korea. On March 30, Senator Hickenlooper (R-Iowa) criticized the State Department for hampering MacArthur in

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[69]Ibid., pp. 2852-56.

Korea, which he considered a war and not a "police action." Senator McMahon (D-Conn.) challenged Hickenlooper to introduce a joint resolution declaring war. Long of Louisiana suggested that the despatch of troops to Korea illustrated the need for the kind of decisions Congress could not make, and Hickenlooper questioned the legality of the despatch in the first place, although he admitted that Congress later approved the action.

McMahon then rose to present a lengthy defense of Presidential power to send troops abroad. With regard to Korea, the Boxer incident of 1900 provided the "most outstanding" precedent. He then said he believed, and thought the "great majority of people" believed, that Truman was justified in sending troops to Korea because of the President's "inherent constitutional authority" to promote United States foreign policy which was to uphold the United Nations Charter.[70]

The upshot of all this debating came on April 4, 1951, when the Senate approved Truman's plans to send four divisions to Europe, but called for congressional approval of any additional ground troops for NATO. Of course the war in Korea continued.[71]

Late in January 1951, United Nations forces had been pushed south of Seoul, but by April they had inched

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[70]Ibid., pp. 3032, 3036-3037, 3042 ff., 3045.

[71]Ibid., pp. 3282-3283.

their way back to the 38th parallel. The Communists then launched their spring offensives, forcing the Americans below the parallel--only to have them surge back again by June. It was now evident that the war had stalemated, although the fighting went on. In June both sides signalled their willingness to negotiate an armistice.[72]

American and Chinese military representatives met near the 38th parallel on July 10, 1951, for the first round of talks. These protracted, often bitter negotiations would go on for two years, as would the bloodshed. The major points of disagreement were over the truce line and the repatriation of prisoners. An added complication was the opposition of Republic of Korea President Rhee to any agreement leaving Korea divided.

The Communists yielded on the truce line issue shortly after the talks were moved to their permanent site at Panmunjom in October 1951. The front line at the time of the signing of the armistice would serve, rather than the 38th parallel. The prisoner issue proved more difficult.

The United States demanded voluntary repatriation since many of its prisoners did not want to go back to North Korea or China; indeed, many were from the South. The Communists wanted a straight non-voluntary exchange.

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[72]Rees, pp. 192, 243-63.

In the spring of 1953, when agreement on this issue was finally reached, Rhee tried to sabotage it by simply releasing thousands of non-communists held and counted among the war prisoners.

Nevertheless an armistice was signed, July 27, 1953. Rhee would not sign, but he had promised not to obstruct it in exchange for United States military and economic aid and a mutual defense treaty.[73]

Even before the interminable negotiations had begun public frustration with the war started to surface. Back in April of 1951, Senator Cain of Washington offered two resolutions, one declaring a state of war, the other calling for an "orderly withdrawal." Neither came to the floor of the legislature.

In May 1951, Senator Mundt of South Dakota questioned the legal basis for the war, noting that past military ventures ordered by the President were to defend American lives and property or to fulfill treaty obligations. These justifications did not apply, Mundt said, to "the most costly and the bloodiest undeclared war in our American history."[74]

In 1952, there were suggestions from the floor of both chambers that Truman be impeached, for among other

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[73]Kolko, pp. 611-14; Rees, pp. 289-327, 420-32; Acheson, pp. 688-689, 831-37.

[74]97 Cong. Rec. 3981, 5078, 5080 (1951).

things, the decision to intervene in Korea. But less drastic measures proved satisfactory. Truman declined to run again, and the voters turned the Democrats out of the White House, electing the smiling general who had vowed, "I shall go to Korea."[75]

Eisenhower visited a devastated peninsula. The United States, which at one point had 350,000 men in Korea, suffered 33,600 fatalities, over 5,000 missing, and more than 100,000 wounded. It is estimated that one and one-half million Communist soldiers were killed, while the Republic of Korea had 300,000 military casualties. The toll on the civilian population was also great. Approximately a million North Koreans were killed or wounded, with equal carnage below the 38th. Millions more were refugees or on relief.[76]

III. The Korean Conflict and the Constitution

A. Effect of the United Nations Charter

The Executive Branch asserted that "[t]he power to send troops abroad is certainly one of the powers which the President may exercise in carrying out such a treaty as . . . the United Nations Charter." Furthermore, "the President can act under article 39" of the Charter and "is under a duty as Chief Executive" to see that the objectives

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[75] 98 Cong. Rec. 725, 4325, 4518-4519, 4539 (1952); Rees, pp. 385-401.

[76] Rees, pp. 33, 450-451; Kolko, p. 615.

of the Charter are carried out. This follows, it is argued, from his powers to interpret and execute treaties.[77]

In a State Department memorandum of July 3, 1950, it was asserted that article 39 of the United Nations Charter and the Security Council resolution of June 27, 1950, pursuant thereto authorized United States action in Korea. It was also contended that the United States has a paramount interest in the United Nations and its peace-keeping measures which the President can promote by armed force without a Congressional declaration of war.[78]

The Administration position rests on the general propositions that treaties are "the supreme Law of the Land,"[79] and the President, who is obligated to "take Care that the Laws be faithfully executed,"[80] therefore has the duty and the authority to enforce treaty provisions. Finally, since he is "Commander-in-Chief of the Army and

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[77] See text accompanying note 67, supra; U. S., Cong., Senate, Powers of the President, pp. 20, 25.

[78] United States Department of State, Memorandum on the Authority of the President to Repel the Attack in Korea, in U. S., Congress, House, Background Information on the Use of United States Armed Forces in Foreign Countries, H. Rept. 127, 82d Cong., 2d sess., 1951, pp. 50, 54.

[79] U. S. Const. art. VI, sec. 2; Ware v. Hylton, 3 Dall. (U. S.) 199 (1796).

[80] U. S. Const. art. II, sec. 3.

Navy,"[81] he may authorize armed force if necessary to carry out such provisions.[82]

One difficulty with this reasoning is that not all treaties are "self-executing." Some pacts or provisions may require positive Congressional action before they can be enforced. As early as 1829, Chief Justice John Marshall declared that in the absence of such implementation, where required, the treaty was not the law of the land.[83]

Senator Taft contended that certain provisions of the United Nations Charter, which had been approved by the Senate and ratified by the President, had never been implemented. Pursuant to article 43 of the Charter, Congress authorized the President in the United Nations Participation Act of 1945,[84] to negotiate special agreements with the Security Council to supply it with American troops for its use. These special agreements had to be approved by the Congress, but subsequent use of these troops under article 42 of the Charter did not. The Act denied the

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[81] U. S. Const. art. II, sec. 2.

[82] Louis Henkin, Foreign Affairs and the Constitution (Mineola, N. Y.: The Foundation Press, 1972), pp. 54-55, 156-157.

[83] Ibid., pp. 156-60; Foster v. Neilson, 2 Pet. (U. S.) 253 (1829).

[84] 59 Stat. 619 (1945).

President authority to increase the size of these troop commitments.[85]

As a result of Soviet-American hostility, these agreements were never negotiated, and therefore article 43 never attained domestic legal validity. It is also possible that article 42, which looked to the use of these forces by the Security Council in order to impose military sanctions may also be unenforceable in American domestic law. Furthermore, that portion of article 39, which authorizes the Security Council to "decide what measures shall be taken in accordance with Articles 41 and 42," may be similarly affected.

However, another clause of article 39 authorizes the Council to "make recommendations," and it is pursuant to this section that the resolution respecting Korea of June 27, 1950, was adopted. A Security Council recommendation is not legally binding upon United Nations members. Thus, Taft's argument is beside the point; but any claim that the resolution of June 27 imposed a legal obligation upon the United States and the President is erroneous.[86]

A second objection to the conclusions drawn by the Administration from the general propositions above,[87] is

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[85] 96 Cong. Rec. 9323 (1950); H. Rept. 127, pp. 4-7.

[86] Goodrich, p. 114; H. Rept. 127, pp. 31-32.

[87] See notes 78-81, supra, and accompanying text.

that the President's powers to execute treaties and to command the armed forces is limited by the power of Congress "To declare War."[88] Whatever the international rights and obligations of the United States, whatever the President's duties and authority to order the fulfillment of these rights and obligations by force, the war-making powers granted Congress by the Constitution remain intact. As one commentator notes,

> the United Nations Charter does not deprive the Congress or the President of constitutional power: both the Congress and the President continue to have their powers--though not the right under international law--to declare war, use force or otherwise act in violation of the United Nations Charter, as they can disregard other international obligations.[89]

In summation, while the United Nations action may have provided moral and legal justification for the United States intervention from the standpoint of international law, it did not cancel the limitations on the power of the President from the standpoint of constitutional law.[90]

B. The Constitutionality of the President's Action

If President Truman's action in respect to Korea was constitutional, it must rely on domestic law and precedent, not merely international law and treaty. The Supreme

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[88]U. S. Const. art. I, sec. 8, par. 11.

[89]Henkin, p. 191.

[90]See Reid v. Covert, 354 U. S. 1 (1957), and my chap. 11, infra.

Court considered the conflict only obliquely, in the famous Steel Seizure Case.[91]

Justice Jackson's concurring opinion is of particular interest. Jackson considered and rejected the Government's contention that the President could seize the steel mills under his authority as Commander-in-Chief. He understood the Government's position to be "that the President having, on his own responsibility, sent American troops abroad derives from that act 'affirmative power' to seize the means of producing a supply of steel for them."[92]

Jackson viewed this reasoning with alarm. "Nothing in our Constitution is plainer," he insisted,

> than that declaration of war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to be more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[93]

At this point Jackson inserted a footnote comparing the modest view of presidential power expressed in Jefferson's message to Congress respecting the first naval

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[91] Youngstown Sheet and Tube Co., et al. v. Sawyer, 343 U. S. 579 (1952).

[92] Ibid., p. 642.

[93] Ibid.

battle with Tripoli.[94] Although the Justice's dicta casts doubt on Truman's theory of Presidential war-powers, he did not "consider the legal status of the Korean conflict," which he assumed to be a "war de facto, whether it is or is not a war de jure."[95]

The dissenters, led by Chief Justice Vinson, felt that in the context of the global threat and the consequent need to step up national defense programs, the seizure was justified. Vinson noted that the United States acted in Korea in response to a United Nations request, and that Congress supported the effort "by provisions for increased military manpower and equipment and for economic stabilization."[96]

One area of difference between Jackson and Vinson is in regard to the role of Congress. While Jackson emphasized the unilateral aspects of Truman's actions, Vinson noted United Nations and legislative support. Our analysis reveals the following:

(1) The Air Force was ordered to provide cover for the evacuation of Americans in Korea, and the Seventh Fleet was dispatched to the region without any Congressional consultation on June 25, 1950.[97]

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[94]For a discussion of Jefferson's message, see my chapt. 3, supra.

[95]Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579, 643 (1952).

[96]Ibid., p. 668.

[97]See text accompanying note 23, supra.

(2) The President ordered full naval and air support for the South Koreans on June 26 without any prior Congressional consent. One Senator was informed of the decision immediately; a fourteen-man Congressional delegation was advised the following day.[98]

(3) Congress approved an extension of the draft on June 27 and 28. Immediate Congressional reaction was highly favorable, but Senators Taft, Kem and Watkins questioned the President's authority.[99]

(4) The President ordered ground troops to Korea and air attacks on the Democratic People's Republic of Korea on June 29 and 30 without prior Congressional consultation. Fifteen Congressional leaders were briefed, June 30, but not informed of plans to use American forces on the front lines. Congressional response continued favorable. The Senate passed mutual defense aid which would permit diverting $100 million for Korea.[100]

Congress increased defense appropriations considerably and on several occasions after the Korean intervention, but not all these increases were directly attributable to Korea. They were part of an overall defense buildup in anticipation of other Soviet or Soviet-inspired aggressive acts. Thus, it may be concluded that Congress gave

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[98]See text accompanying note 27, supra.

[99]See text accompanying notes 30, 32, 33 and 35, supra.

[100]See notes 36-40, supra.

tacit and indirect support to the Korean conflict, but never explicitly either approved or condemned the President's action.

Given the size of the troop commitment, the intensity of the fighting, and the duration of the hostilities, there is little doubt that this was in fact "war" in the full meaning of the word as used in the Constitution.[101] Thus the President's powers as Commander-in-Chief and chief executor of treaties should have been limited by Congress' power to declare war.

Although President Truman's initial decision might have been justified on the grounds that he was acting to protect United States citizens in Korea,[102] this rationale could hardly justify his orders from June 26, 1950, on. In its July 3, 1950, Memorandum, the State Department urged that as Commander-in-Chief the President could unilaterally employ the armed forces to promote the security and foreign policy interests of the United States, including among those interests the maintenance of the United Nations as an effective peace-keeping instrumentality.[103]

In short, the State Department relied upon neither treaty nor statute as warrant for Truman's action,

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[101] U. S. Const. art. 1, sec. 8, par. 11.

[102] See e.g., Henkin, p. 345, note 27.

[103] H. Rept. 127, p. 54.

emphasizing instead the President's powers as Commander-in-Chief. Given the magnitude of the Korean conflict, I doubt that any more extreme claim for Presidential war-commencing power has been tendered in American history. Even in the Vietnam War the President relied, at least initially, on a joint resolution of Congress, the Tonkin Resolution.[104]

The State Department did not claim that the United Nations Charter and the Security Council Resolution of June 27, 1950, authorized the President's action. Such a claim could hardly withstand scrutiny. First, the Resolution was a non-binding recommendation and therefore created no legal obligations upon the United States in international law.[105]

Second, whatever the American obligation in international law, the President is not thereby authorized in domestic law to commence war without Congressional approval. In Truman's defense it must be noted that Congress would undoubtedly have approved a resolution of support had the administration so urged, and it did appropriate funds and renew the draft with full knowledge that the troops and funds would be used in Korea.[106]

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[104] 78 Stat. 384 (1964).

[105] See note 85 and accompanying text, supra.

[106] Henkin, p. 346, note 27.

The courts never resolved the question of the constitutionality of the Korean War, nor do they appear to have been asked to do so nearly as often as they were during the Vietnam War years. The federal courts had an opportunity when one Bolton refused induction, alleging that the Selective Service Act as applied was unconstitutional because Congress gave no consent to the war in Korea.[107]

The Court disposed of Bolton's claim without reaching the merits, declaring:

> Any question as to the legality of an order sending men to Korea to fight in an "undeclared war" should be raised by someone to whom such an order is directed . . .[108]

In summation, the legal justification for the President's action in Korea was that as Commander-in-Chief he had the authority to deploy the armed forces into combat in order to promote the interests of the United States, particularly its interest in supporting United Nations Charter strictures against aggression. Relying only upon subsequent and non-explicit Congressional support, Truman thus stretched Presidential war-commencing powers to the extreme.

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[107] United States v. Bolton, 192 F.2d 805 (2d Cir. 1951).

[108] Ibid.

CHAPTER VIII

THE VIETNAM WAR AND THE CONSTITUTION

I. Historical Background

The United States was neutral during the first three years of the war between the communist-dominated Vietminh led by Ho Chi Minh, and the French Union Forces trying to maintain colonial rule over Indochina. It was only after the success of the communist revolutionaries on mainland China and the outbreak of the Korean War in 1950 that the United States became concerned with southeast Asia.[1]

Thus it was a desire to contain communism, which was assumed to be a monolithic movement, not an intention to abet colonialism that motivated the United States. This is further demonstrated by the unsuccessful attempts to pressure France into granting more independence to the quasi-sovereign State of Vietnam, led by Bao Dai, as a native alternative to the Vietminh.

Nonetheless, from 1950 to 1954, United States policy was to give increasing financial and arms aid to France, while France obstructed attempts to aid Bao Dai directly.

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[1]George McTurnan Kahin and John W. Lewis, The United States in Vietnam (New York: The Dial Press, 1967), pp. 30-31; The Senator Gravel Edition, The Pentagon Papers: The Defense Department History of United States Decisionmaking on Vietnam, 5 vols. (Boston: Beacon Press, Inc., 1972), I:3-7.

The policy failed miserably because the Vietminh were defeating France on the battlefield, and the Bao Dai regime, because of its association with the colonial power, was unable to generate much Vietnamese support.[2]

As the French military position deteriorated the United States markedly stepped up aid in 1954, to the point of shouldering nearly 80% of the war costs that year. Faced with a rout at Dienbienphu in April, 1954, France urged the United States to intervene. The Eisenhower Administration seriously considered an air attack on the Vietminh, but backed off when Congressional leaders refused to support unilateral American action. Fears of "another Korea" led the United States to choose diplomatic rather than military methods.[3]

Although the United States attended the Geneva Conference of 1954, which produced a cease-fire agreement between France and the Vietminh and divided Vietnam at the 17th parallel into two zones, both Washington and the State of Vietnam declined to approve the Final Declaration of the Conference. While the Accords clearly anticipated

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[2]Kahin and Lewis, pp. 31-35. Dean Acheson, Present At The Creation: My Years in the State Department (New York: W. W. Norton & Co., Inc., Signet Books, 1969), pp. 856-63; Pentagon Papers, 1:53-55, 61-75, 81; Bernard Fall, The Two Viet-Nams: A Political and Military Analysis, 2d rev. ed. (New York: Praeger Publishers, 1967), p. 219.

[3]Kahin and Lewis, pp. 32, 35-40; Pentagon Papers, 1:54-55, 77, 100-101; Fall, pp. 226-28.

one unified Vietnam--they expressly denied that the dividing line was a political boundary and called for "general elections" two years hence--loopholes enabled the consolidation of two regimes.[4]

Around the time of the Geneva Conference in mid-1954, Bao Dai brought into his government (which had no real power) an authoritarian, anti-French and anti-communist Catholic named Ngo Dinh Diem. Despite near anarchy in southern Vietnam in the wake of the French withdrawal and a large influx (nearly 900,000, some 85% of whom were Catholics) of refugees from the north, Diem managed, with American encouragement, to establish a measure of control. He eased Bao Dai out of power and placed himself and his family--most conspicuously his brother, Ngo Dinh Nhu, and his sister-in-law, Madame Nhu --in.[5]

Again with American support (on the grounds that neither we nor South Vietnam had assented to the Geneva Accords) Diem refused all northern demands that nation-wide elections be held. Instead, in October, 1955, he proclaimed

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[4]See Agreement on the Cessation of Hostilities in Vietnam, arts. 1, 10, 14, and the Final Declaration of the Geneva Conference, pars. 6, 7, 8, in Further Documents Relating to the Discussion of Indochina at the Geneva Conference (Miscellaneous No. 20 (1954), Command Paper, 9239). London: Great Britain Parliamentary Sessional Papers, XXXI (1953/54), pp. 9-11, 27-38; Pentagon Papers, 1:244

[5]Fall, pp. 234-53; Robert Shaplen, The Lost Revolution: The U.S. in Vietnam, 1946-1966, rev. ed. (New York: Harper and Row, Publishers, Inc., A Colophon Book, 1966), pp. 100-139.

The Republic of Vietnam (GVN), which the United States promptly recognized. (Ho's Democratic Republic of Vietnam, or DRV, had been recognized by Communist China and the Soviet Union back in 1950).[6]

By 1957 it was clear that, whatever the intent of the Geneva Agreements, Vietnam was de facto partitioned. Even the Soviet Union recognized this when it proposed, in January 1957, that the United Nations admit both the DRV and the GVN.[7]

In the wake of Geneva, which the United States privately considered a Communist victory, Washington sought to guarantee that communist gains in southeast Asia would be contained to Vietnam north of 17°. On September 8, 1954, the United States entered into a Southeast Asia Collective Defense Treaty with the United Kingdom, France, Australia, New Zealand, Thailand, the Philippines and Pakistan.[8]

A Protocol to the pact, signed the same day, extended the defensive measures provisions to Cambodia, Laos and "the free territory under the jurisdiction of the State

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[6]Pentagon Papers, 1:4, 245-246; Kahin and Lewis, p. 72.

[7]Pentagon Papers,1:247.

[8]U.S., Department of State, United States Treaties and Other International Agreements, vol. 6, pt. 1, "Southeast Asia Collective Defense Treaty," TIAS 3170, 8 September 1954; Kahin and Lewis, pp. 58-63.

of Vietnam."[9] SEATO, as the Treaty and Protocol were styled, was more important as a statement of United States containment policy in Asia, and later as legal justification for American intervention in Vietnam, than as the establishment of a truly collective defense organization.

The crucial provision is Article IV, wherein

> Each Party recognizes that aggression by means of armed attack in the treaty area . . . would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes.

This article further provides that if any party believes that "the inviolability or integrity of the territory or the sovereignty or political independence" of any signatory or state named in the Protocol "is threatened in any way other than by armed attack . . ., the Parties shall consult immediately in order to agree on . . . measures . . . for the common defense."[10]

In speaking of threats other than armed attack, this latter paragraph is generally understood to refer to subversion. The Senate approved SEATO by a vote of 82 to 1, February 1, 1955. Cambodia withdrew from coverage under the

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[9]United States Treaties and Other International Agreements, vol. 6, pt. 1. "Protocol to the Southeast Asia Collective Defense Treaty," p. 87.

[10]Ibid., p. 83.

Protocol in 1956; Laos did the same in 1962.[11]

Having placed South Vietnam under the United States defensive umbrella, the Eisenhower Administration proceeded to aid Diem in establishing an independent (of France, but not of America) non-communist state in southeast Asia. In a letter to Diem, President Eisenhower promised that the United States would aid the GVN in order to develop "a strong, viable state, capable of resisting attempted subversion or aggression through military means."[12]

From 1954 to 1961, the United States provided lavish financial aid to the Diem regime, 80% of which went to security, despite the fact that most of it was nominally economic aid. American military advisers began training the South Vietnamese army during this period, although United States military personnel never numbered over 700 men. At the same time, consistent with the Cold War pattern, both Moscow and Peking generously aided North Vietnam.[13]

In sum, it was the policy of both the Truman and Eisenhower administrations to promote a non-communist Vietnam short of committing American troops to a land war on the

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[11]United States, Congress, Senate, Hearing before the Foreign Relations Committee on Executive K, pt. 1, 83rd Cong., 2d sess., 1954, pp. 20, 28; 101 Cong. Rec. 1060 (1955); Roger H. Hull and John C. Novogrod, Law and Vietnam (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1968), p. 137, note 69.

[12]Letter from President Eisenhower to President Diem of 1 October 1954, in Kahin and Lewis, p. 383.

[13]Pentagon Papers, 1:268, 2:433; Kahin and Lewis, p.88.

Asian continent.

It was the Administration of John F. Kennedy (1961-1962) which took a major (but not the decisive) step in altering the latter half of that policy. Under Kennedy there was a significant build-up in the number of American "advisers," to the point where the United States military role was substantially altered. The change came in response to the disintegration of the anti-communist Saigon government; what caused that disintegration is quite controversial.

Analysts do agree that in 1958 a systematic rebellion against the Diem regime broke out in South Vietnam, and that Hanoi openly called for the overthrow of Diem in May, 1959. They do not agree on Washington's allegation that the DRV planned and organized the insurrection from the start. The evidence supporting this contention is scanty. But if the charge were true, Diem certainly made things easy by thoroughly alienating the South Vietnamese peasant who constitutes 90% of the population.[14]

By the time the National Liberation Front was formed, a month before Kennedy's January, 1961, inauguration, it is said that support for Diem was "weak and waning," and that the Saigon regime was "manifestly out of touch with the people." The Front (NLF) was the political arm of the Viet

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[14]Pentagon Papers, 1:242-65; Kahin and Lewis, pp. 99-120; Fall, pp. 356-59; United States, Department of State, Aggression from the North: The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam (Washington: Government Printing Office, 1965), passim.

Cong, or Vietnamese Communists, a term Diem applied loosely to more than just the anti-Saigon insurrectionists.[15]

Thus, while the NLF's structural links with Hanoi are undeniable, it is also clear that the Viet Cong had popular support in South Vietnam. Unlike Korea, there was no regular army of the North attacking the South. (American intelligence did not detect regular North Vietnamese army units in the South until late 1964.) There was instead a wave of terror aimed at Saigon officials in the countryside starting in 1958 and manned almost entirely by South Vietnamese. In fact, in 1966, Secretary of State Dean Rusk estimated that "80 percent of those who are called Vietcong are or have been southerners."[16]

By 1960, the guerrillas, who were outnumbered 7-1 by Diem's forces, claimed control of half of South Vietnam. Although Kennedy approved a Counter-Insurgency Plan shortly after assuming office (more United States aid plus demands for GVN reforms), Vietnam was only an intermittent focus of Washington's concern in 1961.[17]

Following the Bay of Pigs debacle in late April 1961,

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[15] Pentagon Papers, 1:250-251; Kahin and Lewis, p. 118.

[16] Fall, pp. 356-66; Lyndon Baines Johnson, The Vantage Point: Perspectives of the Presidency, 1963-1969 (New York: Holt, Rinehart and Winston, Inc., 1971), pp. 121-122; United States, Congress, Senate, Supplemental Foreign Assistance Fiscal Year 1966-Vietnam, Hearings before the Committee on Foreign Relations, 89th Cong., 2d sess., 1966, pt. 1, p. 29.

[17] Shaplen, p. 141; Pentagon Papers, 2:1, 18, 23-25.

and the prospect that the United States-backed faction in Laos would completely collapse, the Kennedy Administration decided to renew its commitment to South Vietnam. Vice-President Lyndon B. Johnson was sent to southeast Asia to boost morale, and returned convinced that the United States must "battle against Communism . . . in Southeast Asia . . . or . . . surrender the Pacific."[18]

But more significant to this narrative was Kennedy's approval on May 11, 1961, of a program for South Vietnam which included a 100-man increase in regular Army advisers to a total of 785, and 400 Special Forces (Green Berets) as part of a covert CIA program. The Green Berets were sent "to accelerate G.V.N. Special Forces training," not to engage in combat. This was not made public, but J. W. Fulbright, Chairman of the Senate Foreign Relations Committee, announced after conferring with the President on May 4, that he would support an Administration decision to send combat forces to Vietnam.[19]

While the May 1961 decisions were made more in response to the Laos situation, in October 1961 Washington responded directly to developments in South Vietnam. A sharp upsurge in Viet Cong attacks in September seriously eroded the morale of the Saigon government. President Kennedy sent

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[18]Pentagon Papers, 2:22, 33, 57.

[19]Ibid., pp. 50-51; Lester A. Sobel, ed. South Vietnam: U.S.-Communist Confrontation in Southeast Asia, Volume I, 1961-65 (New York: Facts on File, Inc., 1966), p. 19.

his military adviser, General Maxwell Taylor, and White House Staff member, Walt W. Rostow to Vietnam on October 11 to assess various military options, including the introduction of American combat forces.[20]

Taylor-Rostow recommended that 6-8,000 combat troops be dispatched on the pretext of providing flood relief, but the Administration scotched widespread rumors of a United States ground troops commitment by leaking a contradictory story to the New York Times. In fact, Kennedy deferred decision on the combat troop proposal while authorizing the Defense Department to prepare plans for the large-scale use of such forces should such a strategy be adopted. Taylor-Rostow also noted North Vietnam's vulnerability to air attack, thus presaging by several years what was to become a pillar of United States policy.[21]

Following the Taylor-Rostow Mission, President Kennedy approved in November 1961: the expansion of the Army advisory group (from 785 to over 2000 by January 1962), an increase in Special Forces (from 400 to over 800), the provision of helicopter companies to transport the South Vietnamese army into battle, tactical air and artillery support, as well as provision of small arms, light craft and air

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[20] Pentagon Papers, 2:4, 447.

[21] Ibid., pp. 82, 86, 88, 92, 114, 116-18.

reconnaissance equipment and personnel.[22]

The decisions following the Taylor-Rostow report established the pattern for United States policy in Vietnam for the next two years. During this period Washington and Diem agreed to what was known as the Strategic Hamlet Program, designed to obtain peasant support via relocation into villages fortified against the Viet Cong. Both the French and Diem had tried this before, and as before, it was an utter failure.[23]

The Viet Cong meanwhile, stepped up their wave of terror in the countryside simultaneous with the introduction of United States firepower. United States military personnel increased to 11,000 by the end of 1962, and the number of Viet Cong kidnappings and assassinations increased to 11,407. (The latter figure was 2,100 in 1960.) Use of American-manned machine gun crews on the helicopters ferrying the GVN army into combat, and United States bombing and strafing missions against suspected Viet Cong locations (850 a month as of February 1963) were clearly taking their toll on the insurgents.[24]

As a result of unduly optimistic intelligence reports

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[22]Ibid., pp. 114, 454-455.

[23]Ibid., pp. 128-31.

[24]Kahin and Lewis, p. 138; Pentagon Papers, 2:703, 722.

Washington even planned to withdraw troops as of the summer of 1962. These plans were never implemented, and were abandoned after the Diem government collapsed in Autumn, 1963. At that time United States military personnel reached a Kennedy Administration high of 16,700.[25]

While new information is currently coming to light, it is clear from the Pentagon Papers that the United States at least encouraged and tacitly supported the overthrow of the Diem regime. The surface cause was the conflict between the Buddhist monks and the Catholic Diem-Nhu family; but underlying this was the smoldering discontent caused by Diem's autocratic rule.

After the violent suppression of a Buddhist protest in Hué in May, 1963, widespread demonstrations took place for most of the summer. Washington's pleas for conciliation went unheeded, and following a government raid on Buddhist pagodas in August, the State Department encouraged dissident military men to overthrow the brothers.

The August plot fizzled. After reviewing its Vietnam policy Washington sent Secretary of Defense Mcnamara and Chairman of the Joint Chiefs of Staff Taylor to Vietnam in September. McNamara and Taylor urged various diplomatic and economic pressures be imposed on Diem. Once again anti-Diem generals felt they were given a green light to conduct a coup.

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[25] Pentagon Papers, 2:160-65.

This time, on November 1, 1963, they succeeded; Diem and Nhu escaped, but were quickly captured and murdered.[26]

In his memoirs, President Johnson, with the benefit of hindsight, and having been plagued by nearly two years with virtually no leadership in Saigon, would condemn the coup as "a serious blunder." If so, Johnson was the immediate "beneficiary," for only three weeks after the coup, Kennedy was himself assassinated.[27]

II. Expansion of the War in Vietnam

One could credibly argue that when Lyndon Johnson took the oath of office on the 22nd of November, 1963, the United States was already at war, although on a relatively small scale, in Vietnam. Over 16,000 military men were there; nearly 200 Americans had died there, half in combat situations; and the United States was providing combat air support as well as armed air transport for the army of the GVN (ARVN).[28]

Nevertheless, the United States was not providing troops for ground combat. Nor was it yet bombing North Vietnam, which was openly aiding the southern revolutionaries,

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[26] Ibid., pp. 201-7, 734, 738.

[27] Johnson, p. 61.

[28] Sobel, p. 78.

although short of sending down uniformed regular forces. Furthermore, United States involvement was small considering its capabilities. And the Congress approved the large-scale aid programs for South Vietnam, while only a handful of legislators, most notably Senator Mansfield, voiced disapproval of the military policy.[29]

The instability of the Saigon government was one of the major concerns of the Johnson Administration throughout 1964. The GVN suffered six major changes of government from 1964 to mid-1965. All of these governments assumed power illegitimately, ruled undemocratically, and were unable or unwilling to obtain the loyalty of the Vietnamese peasant. And yet the United States backed them, principally because these military cliques appeared to provide the only anti-communist alternative.[30]

The ineffectiveness of Saigon served to deepen American involvement on the grounds that only the United States could do what was needed to maintain an anti-communist South Vietnam. A second factor was the realization in early 1964 that United States intelligence and assumptions about Vietnam had been overly optimistic.[31]

On March 8, 1964, the President sent General Taylor

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[29]Ibid., pp. 55-56; 109 Cong. Rec. 7308-7309, 21061 (1963).

[30]Pentagon Papers, 2:277-79.

[31]Pentagon Papers, 3:2, 22-24.

and secretary of Defense McNamara to Vietnam on a "fact-finding mission." In reality, the purpose was a major reassessment of United States policy, and the result was a detailed policy paper (NSAM 288) establishing a deeper American commitment to Vietnam.[32]

The background to this paper is significant. French President De Gaulle had proposed first on August 29, 1963, then again on January 31, 1964, the neutralization of southeast Asia. Presidents Kennedy and Johnson voiced criticism, while Senator Mansfield (D-Mont.) urged its consideration.[33]

Meanwhile the Joint Chiefs of Staff began pressuring the Administration from late January,1964, on to bomb North Vietnam. And in April, after NSAM 288 was approved, the Saigon government launched a campaign to get Washington to approve overt attacks on the DRV. A program of covert actions against the North had been begun February 1, 1964. These sabotage and psychological warfare missions were directed by the United States military and CIA, but were to be carried out by Vietnamese or other nationals.[34]

In the Congress, in March, Senators Morse (D-Ore.) and Gruening (D-Alas.) launched a two-man protest against the

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[32]Ibid., pp. 8, 46-50.

[33]Sobel, pp. 86, 97; 110 Cong. Rec. 3114-3115 (1964).

[34]Pentagon Papers, 3:8, 44-45, 64-67, 81, 149-52, 496-99.

increasing Americanization of the Vietnam conflict. Their criticisms went unheeded, and were said to have cleared the Senate chamber as they repeatedly presented them in the months ahead.[35]

NSAM 288, which was approved by the President on the 17th of March, 1964, declared the American objective to be "an independent non-Communist South Vietnam." But now the "stakes" were considered to be "high" because of a belief in the domino effect on "almost all of Southeast Asia," the increased United States involvement since 1961, and the sense that Vietnam was seen by the world as "a test case of United States capacity to help a nation meet a Communist 'war of liberation.'"[36]

The Memorandum went on to reject bombing the DRV "at this time," while "preparations for such a capability" were recommended. Two bombing programs were to be developed, one called for "{r}etaliatory strikes . . . on a tit-for-tat basis," the other entitled "Graduated Overt Military Pressure."[37]

De Gaulle's neutralization plan was also rejected as

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[35]See, e.g., 110 Cong. Rec. 4831-35, 6574-6604 (1964); Anthony Austin, The President's War: The Story of the Tonkin Gulf Resolution and How the Nation was Trapped in Vietnam (Philadelphia: J. B. Lippincott Co., A New York Times Book, 1971), p. 66.

[36]Pentagon Papers, 3:499-500.

[37]Ibid., pp. 503-504, 508.

leading to "a Communist take-over." Instead, more United States aid and advisers were to be sent, and the GVN was expected to mobilize the entire country to stem what Washington now knew were significant Viet Cong advances.[38]

In short, the United States was now firmly committed to defeating the Viet Cong by military means; political approaches (making the GVN more popular with the peasantry) and diplomacy (à la De Gaulle) were considered secondary. For this reason Roger Hilsman, who championed the "political" approach resigned his post as Assistant Secretary of State for Far Eastern Affairs.[39]

On April 25, 1964, General William C. Westmoreland was named head of Military Assistance Command, Vietnam, and a month later General Maxwell Taylor replaced Henry Cabot Lodge as Ambassador to South Vietnam. By mid-June a southeast Asia resolution had already been prepared in secret by Administration planners, who met on the 15th to consider the foreign policy and political implications of going to Congress. In June it was revealed that the United States had constructed a new air base at Da Nang, part of a network of new military facilities in South Vietnam and Thailand.[40]

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[38]Ibid., pp. 503, 505-7.

[39]Ibid., p. 43.

[40]Ibid., pp. 10, 11, 77, 180, 182.

Thus, all the elements for escalation were in place when the Gulf of Tonkin incidents occurred the first week of August, 1964.

On August 2, an American destroyer, the USS Maddox, was fired on while 28 miles off the North Vietnamese coast. The attackers apparently believed that the Maddox had participated in a raid on an offshore island three days before. The raid was part of the covert activities planned by the United States and carried out by the South Vietnamese. The Maddox was not in fact a participant but was in the Gulf to conduct reconnaissance patrols to within 8 miles of the DRV coast.[41]

The Maddox returned fire, disabling one of the three attacking vessels, and United States jets coming to the rescue of the Maddox damaged the other two. The next day the Maddox continued its reconnaissance patrol along with another ship, the C. Turner Joy. That night, August 3, another GVN raid took place. The following evening the destroyers reported another attack, but since nothing could be seen in the darkness and the American ships were never struck, the entire incident was based upon sonar readings and intercepted DRV radio communications.[42]

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[41]Ibid., pp. 182-84.

[42]Pentagon Papers, 5:324-26.

The second incident remains controversial; even more so because President Johnson ordered retaliatory air attacks on DRV naval facilities on August 4th, before all the confusing details were passed on to Washington. More important still, these incidents offered the Administration the opportunity to go to Congress and get support for its Vietnam policies.[43]

Early that same evening, August 4, President Johnson obtained support from 16 Congressmen who conferred with him at the White House, including majority and minority party leaders and key committee chairmen. The next day, Senator Fulbright introduced what has come to be known as the Tonkin Gulf Resolution, asking that it be sent to the Committees on Foreign Relations and Armed Services sitting jointly. Senator Morse immediately condemned it as "a predated declaration of war."[44]

The major components of the Resolution are as follows. It is entitled, "A Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia." The Preamble condemns "the Communist regime in Vietnam" for attacking American vessels as "part of a deliberate and systematic campaign of aggression . . . against its neighbors

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[43]Ibid., pp. 326-327; Austin, p. 309; United States Congress, Senate, The Gulf of Tonkin: The 1964 Incidents, Hearing before the Committee on Foreign Relations, 90th Cong., 2d sess., 1968; Johnson, pp. 114-115.

[44]Johnson, pp. 115-18; 110 Cong. Rec. 18132-18133 (1964).

and the nations joined with them in the collective defense of their freedom."

In Section 1,

> Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

The second section declares that southeast Asian peace and security are "vital" to the United States, and that "in accordance with its obligations under" SEATO,

> the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

The last section provides for expiration "when the President shall determine that the peace and security of the area is reasonably assured," or by concurrent resolution of Congress.[45]

On the sixth, brief hearings were held, at which Secretary of State Dean Rusk, Secretary McNamara, and Chairman of the Joint Chiefs of Staff, General Wheeler, testified. Only Senator Morse opposed favorably recommending the Resolution, which was reported that day along with the following statement:

The basic purpose of this resolution is to make it

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[45] 78 Stat. 384 (1964).

> clear that the Congress approves the action taken by the President to meet the attack on United States forces . . . . Full support by the Congress is also declared for the resolute policy enunciated by the President in order to prevent further aggression, or to retaliate with suitable measures should such aggression take place.[46]

The brief Senate debate that followed was not especially instructive. Senator Brewster asked floor manager Fulbright if the resolution "would authorize or recommend or approve the landing of large American armies in Vietnam or China," and was told:

> There is nothing in the resolution, as I read it, that contemplates it . . . . However, the language of the resolution would not prevent it. It would authorize whatever the Commander in Chief feels is necessary. It does not restrain the Executive from doing it.[47]

Senator Miller asked whether the phrase "further aggression" applied to aggression against South Vietnam as well as the United States, to which Senator Fulbright responded, "I believe that both are included in that phrase."[48]

In a rather tortured colloquy, Senator Fulbright tried to allay the fears of Senator Nelson that the Congress was authorizing the President to commit an American land army to

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[46]United States, Congress, Senate, Southeast Asia Resolution, Joint Hearing before the Committee on Foreign Relations and the Committee on Armed Services, 88th Cong., 2d sess., 1964; United States, Congress, Senate, Promoting the Maintenance of International Peace and Security in Southeast Asia, S. Rept. 1329 to Accompany H. J. Res. 1145, 88th Cong., 2d sess., 1964.

[47]110 Cong. Rec. 18403 (1964).

[48]Ibid., p. 18405.

war against North Vietnam. In essence, the response was that the proposal neither authorized nor prohibited such action, that the President could continue to use "whatever means seemed appropriate" in order to maintain South Vietnamese independence, and that if the action "were too inappropriate" Congress could terminate the measure.[49]

The exchange with Senator Cooper was the most revealing of all. The Kentuckian wanted to know if section two of the Resolution was triggering the SEATO pact in accordance with our "constitutional processes." "In other words," he queried,

> are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense . . .?
>
> MR. FULBRIGHT. I think that is correct.
>
> MR. COOPER. Then looking ahead, if the President decided that it was necessary to use such force as could lead into war, will we give that authority by this resolution?
>
> MR. FULBRIGHT. That is the way I would interpret it.

And when Cooper asked if section two authorized the President to attack "cities and ports in North Vietnam . . . to prevent any further aggression against South Vietnam," the Chairman responded with a generalization about the inappropriateness of formal declarations of war to current day

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[49]Ibid., pp. 18406-18407.

conditions.[50]

A few more hours of debate were set aside for August 7, during which both Senators Morse and Gruening condemned the measure. Morse contended that it violated Article I, section 8, paragraph 11 of the Constitution by giving the President "warmaking power." And Gruening thought it "the equivalent of a declaration of war by the Congress."[51]

Senator Nelson then offered an amendment limiting United States activities to aiding, training and given military advice to the GVN, and declaring it to be the sense of Congress that

> except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the southeast Asian conflict.

Senator Fulbright said he agreed with the policy enunciated by the amendment, but rejected it in order to expedite final approval of the resolution.[52]

The Senate then approved by an 88-2 vote, Morse and Gruening dissenting. The House had already assented with scanty debate, 416-0, Congressman Powell of Harlem voting "Present."[53]

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[50]Ibid., pp. 18409-18410.

[51]Ibid., pp. 18443-48.

[52]Ibid., p. 18459.

[53]Ibid., pp. 18470-18471, 18555.

On the 10th of August, 1964, the day a Presidential signature converted the Tonkin Resolution into Public Law 88-408, Ambassador Taylor reported that the latest Saigon government was in danger of collapsing. This news, added to signs of increased communist infiltration into South Vietnam led to a general agreement among policy-makers in early September that the United States should bomb North Vietnam.[54]

Following a meeting with his advisers on September 9, President Johnson ordered the Air Force to be prepared to carry out retaliatory strikes against the DRV. It will be recalled that a program of retaliatory strikes was called for in March, in NSAM 288.[55]

Bombing was deferred, however, primarily for political reasons; and this despite a daring Viet Cong raid on November 1 at Bien Hoa air base. The President was in the midst of an election campaign in which he was portraying himself as restrained and his opponent, Senator Goldwater, as trigger-happy, and these circumstances undoubtedly stayed his hand.[56]

But electoral politics was not the only consideration, because even after his stunning victory, President Johnson

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[54]78 Stat. 384 (1964); Pentagon Papers, 3:191-192.

[55]Johnson, pp. 120-121; see note 37 and accompanying text, supra.

[56]Johnson, p. 121; Pentagon Papers, 3:111.

refused to permit reprisals for a Christmas attack on a United States army officers' billet in Saigon. This time it was feared that the Saigon government was "too shaky" to withstand any major DRV counter-retaliation.[57]

1965, then, was to usher in momentous decisions for the United States role in Vietnam. In January of the new year there were 22,755 American military personnel there. The GVN was going through the throes of yet another political crisis. And members of Congress began to publicly question United States policy, joining the already-critical New York Times and St. Louis Post-Dispatch.[58]

Senator Morse criticized the United States for taking unilateral action in Vietnam, while Senators Cooper and Monroney called for full Senate debate. Senator Mansfield urged support of colleague Church's neutralization proposal. An Associated Press survey of Senators of 6 January, 1965, revealed that of the 63 legislators polled, 31 favored a negotiated settlement after the United States-GVN bargaining position improved; 10 favored immediate negotiations; 8 wanted a United States attack on North Vietnam; 3 urged immediate United States withdrawal, and 11 didn't know what to do beyond strengthening the GVN.[59]

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[57]Johnson, p. 121.

[58]Pentagon Papers, 3:90, 259-62, 263.

[59]Ibid., p. 263.

In mid-January, following reports of two American jets downed over Laos, and a wire-service story revealing that the United States had regularly been flying missions over Laos, Senator McGovern condemned plans to extend the war to the North. (The Pentagon Papers reveal that the United States had been conducting reconnaissance flights and providing armed escorts for Royal Laotian Air Force strike missions since May, 1964. Starting in mid-December, 1964, the United States began bombing Pathet Lao/North Vietnamese concentrations in northern Laos. Laotian Premier Souvanna Phouma, approved the policies.)[60]

In fact, of course, Washington had already decided to bomb the North on a retaliatory basis back in September, 1964, a decision reconfirmed December 1, at which time President Johnson also authorized, at least in principle, a program of gradually increasing air strikes. Execution, however, was contingent upon improvement in GVN performance, a development which never occurred.[61]

In January, 1965, the USSR publicly announced support for the DRV if the United States were to launch open hostilities. Washington was further alarmed by what it perceived as signs of a new alliance among communist Asian nations, including Sukarno's Indonesia. All of this reinforced the

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[60]Ibid., pp. 263-264, 253-254.

[61]See note 55 and accompanying text, supra; Pentagon Papers, 3:115.

American tendency to view Vietnam in terms of a global struggle.[62]

The decision to begin the bombing came on February 6, 1965, following a spectacular attack upon American military installations in and around Pleiku. Word of the attack was received that afternoon, and the decision to launch the air strikes was made at a National Security Council meeting in the evening. House Speaker McCormack, and Senate Majority Leader Mansfield attended the conference, and Johnson described Mansfield as being "strongly opposed" to the bombing.[63]

On February 13, President Johnson approved the program of sustained, steadily intensifying air attacks on selected North Vietnamese military targets. The program, code-named ROLLING THUNDER, was delayed until March 2, 1965. Thereafter, North Vietnam was bombed regularly for the next three and a half years of the Johnson administration, except for nine complete halts, six of which lasted less than a week.[64]

Congress was never asked to give, and never volunteered any additional express approval of these overt acts of war against a sovereign nation. ROLLING THUNDER'S principal aim was to discourage the DRV from supporting the com-

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[62]Pentagon Papers, 3:266-267; Johnson, pp. 135-136.

[63]Johnson, pp. 124-125.

[64]Pentagon Papers, 3:271-272; Johnson, p. 578.

munist revolution in the South. To the extent that this was dependent upon breaking the will of the DRV leaders the bombing failed. For, in the words of the Pentagon Papers analyst, the air attacks "seemed to stiffen rather than soften Hanoi's backbone."[65]

On March 6, 1965, the Pentagon announced that 3,500 United States Marines were being deployed to Da Nang air base to provide base security and free South Vietnamese for offensive action. These were the first American ground troops to enter the Vietnam War, and although their initial mission was base security and not combat, pressure immediately developed to expand the American ground effort.[66]

Once again, Congress was not asked to approve the decision. In fact, throughout the Spring of 1965, the debate between proponents of enlarged United States ground combat operations, most notable of which was General Westmoreland, and those who had misgivings about such an expansion, went on largely in secret.[67]

In mid-March, 1965, President Johnson approved plans to intensify the air war, and near the end of the month, press speculation was rife with reports of imminent decisions respecting ground troops. The President declared that he

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[65] Pentagon Papers, 3:269.

[66] Ibid., p. 423.

[67] Ibid., pp. 430, 445.

knew "of no far reaching strategy that is being suggested or promulgated." But on April 1, the very day after this statement was made, Johnson approved deployment of two additional Marine combat battalions and 18-20,000 more non-combat military personnel. Of equal significance was the alteration in the mission of the marines from base security exclusively to security plus limited offensive operations.[68]

The April, 1965, decisions not only raised United States military totals to a new high of 40,200 men, but for the first time American forces were to engage in ground combat. In the formal memorandum recording these decisions (NSAM 328, dated April 6, 1965) the attitude of the Administration toward public debate on the commitment of ground forces is easily inferred.

> The President desires that with respect to the actions in paragraphs 5 through 7,{concerning ground troops} premature publicity be avoided by all possible precautions. The actions themselves should be taken as rapidly as practicable, but in ways that should minimize any appearance of sudden changes in policy . . . . The President's desire is that these movements and changes should be understood as being gradual and wholly consistent with existent policy.[69]

The changes were not announced publicly until June 8, by which time the President had already approved increasing troop strength to 70,000. In late June, 1965, the strategy

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[68]Ibid., pp. 338, 348, 447, 449.

[69]Ibid., pp. 456, 703.

of limited offensive forays from coastal enclaves was altered at the urging of General Westmoreland, who also had called for the immediate dispatch of nearly 125,000 combat troops. United States troops would now take the war to the Viet Cong under a policy dubbed "Search and Destroy." The President granted Westmoreland's 125,000 troop request on July 17, 1965, delaying public announcement until the 28th.[70]

Thus the Vietnam War had been thoroughly Americanized during the spring and summer of 1965. Congressional involvement in the decision-making was minimal, since most of the decisions were shrouded in secrecy. Congressional support over and above the Gulf of Tonkin Resolution would have to be inferred from the following.

On May 4, 1965, President Johnson asked Congress to approve a supplemental defense budget appropriation of 700,000,000 dollars, "to meet increasing costs in Vietnam." In his message to Congress, the President suggested that "each member of Congress who supports this request is also voting to halt Communist aggression in South Vietnam." During the debates several Senators expressed reservations. Morse urged that this request "for additional warmaking funds" be preceded by a request for a Congressional declaration of war.[71]

Senator Javits favored the appropriation but did not

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[70]Ibid., pp. 415, 438-40, 445, 476-477.

[71]Johnson, p. 142; 111 Cong. Rec. 9282, 9315-9316 (1965).

think it a substitute for a resolution supporting a ground war in Vietnam. Javits did not think the Tonkin Resolution to be adequate support for such a war. But Senator Saltonstall thought that a failure to approve the appropriation would be a "repudiation" of the August, 1964, measure. To which Senator Gore responded that he "did not intend by voting for that joint resolution to approve an escalation of the war or . . . the sending of combat units."[72]

Senator Aiken declared that his support of the appropriation should not be construed as an intention to grant "authority to wage war." Senator Church asked the bill's sponsor, Mr. Stennis, if Congress would be conferring Congressional approval on future unanticipated acts of war in Vietnam. Stennis replied that the language of the resolution does not set policy, and while it does not restrict the President, neither is it a declaration of war. "It is not," Stennis added,

> a blank check . . . . We are backing up our men and also backing up the present policy of the President. If he substantially enlarges or changes it, I would assume he would come back to us in one way or another.[73]

On the House side, debates reveal that the Republicans also conceived of the appropriation as support for the President's Vietnam policy. There the measure was speedily

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[72]111 Cong. Rec. 9453, 9495, 9497 (1965).

[73]Ibid., pp. 9499, 9500.

approved by a 408 to 7 vote on May 5. The Senate assented the following day, 88 to 3, Morse, Gruening and Nelson the only "nays."[74]

It must be remembered that decisions involving the United States in ground combat in Vietnam were closely guarded by the Administration during the time period in which the appropriation was passed. Public announcements of troop buildups were not made until June. Just before the President announced his decision to commit 125,000 combat soldiers (but ten days after the decision had been made) Mr. Johnson conferred with several Congressmen.[75]

At this July 27 meeting, the President informed the eleven legislators of his plans to widen the ground war. According to Johnson's account, he told the Congressmen that he did not want "'to go the full congressional route now,'" and that the United States' "fundamental policy was unchanged." The President records Congressmen Carl Albert and Hale Boggs as favoring the buildup without going to Congress, Senator Bourke Hickenlooper as undecided on the issue of going to Congress, and Senator Mike Mansfield as the only one expressing "serious doubt and opposition" to the expansion of the war.[76]

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[74]Ibid., pp. 9518-41, 9772.

[75]Pentagon Papers, 3:445, 4:299.

[76]Johnson, pp. 150-151.

And so, no additional supporting legislation was requested, and none was approved. The decisions to commit ground combat forces to South Vietnam and launch an air war over the North, plans made secretly and revealed piecemeal over the first half of 1965, won the silent approval and financial support of Congress. Furthermore, public opposition to the war at this time, while not insignificant, was not nearly as widespread or vociferous as it would become. An August, 1965, public opinion survey revealed 61% in support of the war, 24% opposed, and 15% without an opinion.[77]

Since this essay is concerned with the initiation of the conflict it will not detail the course of the war with its terrible destructiveness and its tumultuous consequences for American domestic politics. The following figures should convey a sense of the magnitude and intensity of the conflict.

If we date the start of the war at spring, 1965, when North Vietnam was first attacked regularly from the air and American combat troops were dispatched, then the conflict lasted 7½ years, ending with the Paris peace agreement in January, 1973. During these years, the United States ground troop commitment went as high as 549,500 men, authorized in April, 1968.[78]

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[77]John E. Mueller, War, Presidents and Public Opinion (New York: John Wiley and Sons, Inc., 1973), pp. 54-55.

[78]Pentagon Papers, 4:602.

According to Defense Department figures released in early 1975, 46,370 Americans were killed in Vietnam, 153,000 were seriously wounded. The Pentagon reports that the South Vietnamese suffered over a million casualties, while it is estimated that an equal number of enemy forces were killed.[79]

The intensity of the air war is revealed by the tonnage statistics. By the end of 1967, with the war not three years old, the United States had, according to the Defense Department's data, already dropped greater tonnage on Vietnam than it had loosed upon the whole European theatre in World War II; nearly half the tonnage was dropped upon South Vietnam.[80]

A number of significant legislative actions are worth noting as well, especially as they pertain to the constitutionality of the conflict. As a direct outgrowth of the Vietnam War the upper chamber approved on June 25, 1969, a "sense of the Senate" resolution on "national commitments." The measure, which is not legally binding, states that the United States can have a commitment to aid in the defense of a foreign country only as a result of

> affirmative action taken by the legislative and executive branches . . . by means of a treaty, statute, or concurrent resolution . . .specifically

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[79]See Congressional Quarterly Weekly Reports 33 (April 26, 1975):843.

[80]Pentagon Papers, 4:216.

providing for such commitment.[81]

Following the controversial Cambodian incursion in late April, 1970, the Senate passed the Cooper-Church amendment to a foreign aid authorization act, ultimately cleared on December 22, 1970. The amendment, approved by the Senate on June 30, prohibited the expenditure of funds to introduce ground troops or advisers into Cambodia. An earlier act, approved December 29, 1969, applied similar restrictions to funds for Laos and Thailand.[82]

During the summer of 1970, the Senate twice voted repeal of the Gulf of Tonkin Resolution, once after the Nixon Administration announced that the law was no longer appropriate to its policies. But the necessary House approval did not come until December 31, 1970, in the form of an amendment to a foreign military sales bill as opposed to a concurrent resolution as provided for in section 3 of the Resolution itself. Furthermore, House approval of the repeal rested upon the Administration's argument that the Tonkin resolution was "unnecessary." The Senate then passed the

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[81]Congressional Quarterly Service, Congress and the Nation-Volume III, 1969-1972 (Washington: Congressional Quarterly, Inc., 1973),pp. 856-857; S. Res. 85, 91st Cong., 1st sess., 115 Cong. Rec. 17245 (1969).

[82]Congress and The Nation, pp. 910-911, 913-914; Special Foreign Assistance Act of 1971, Pub. L. 91-652, sec. 7(a), 84 Stat. 1942 (1971); Department of Defense Appropriation Act, 1970, Pub. L. 91-171, sec. 643, 83 Stat. 469 (1969).

military sales bill (thus voting repeal of Tonkin Gulf for a third time!), whereupon President Nixon's signature laid the once controversial measure to rest.[83]

By 1970, a number of resolutions to "end the war" were proposed, of which perhaps the best known is the Hatfield-McGovern amendment, cutting off military expenditures in Indochina after a set date. The full Congress never approved Hatfield-McGovern, but did adopt Senator Mansfield's amendment to a draft extension bill, passed September 21, 1971. This Mansfield amendment declared it to be the "sense of Congress" that the United States end military operations in Indochina "at the earliest practicable date," with a "date certain" to be set for troop withdrawals.[84]

In a bolder assertion of Congressional authority, the Mansfield amendment was passed again, (now as part of a defense procurement measure), only this time it declared itself to be the "policy of the United States," rather than merely the "sense of Congress." The Administration was not oblivious to the change in wording, and when the President signed the procurement bill in November, 1971, he pointed

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[83] Congress and The Nation, pp. 910-911; United States, Congress, House, Foreign Military Sales Act Amendments, H. Rept. 1805 to Accompany H. R. 15628, 91st Cong., 2d sess., 1970; Foreign Military Sales Act, amendments, Pub. L. 91-672, sec. 12, 84 Stat. 2053 (1971).

[84] H. R. 17123, 91st Cong., 2d sess. (1970); Military Selective Service Act of 1967, amendments, Pub. L. 92-129, sec. 401, 85 Stat. 348 (1971); Congress and The Nation. p. 916.

out that the Amendment did not enunciate the policy of the Administration and was "without binding force or effect."[85]

Direct American military activities in Vietnam had ended by late March, 1973, but air strikes continued over Cambodia. In June, 1973, Congress approved, and Nixon successfully vetoed, an immediate cutoff of funds for combat activities in Cambodia and Laos. In a compromise with the Administration, funds were cut off for all American combat activities in Indochina as of August 15, 1973. Four other combat expenditure restrictions were enacted after the compromise measure cleared on June 29.[86]

From a constitutional standpoint, however, the most important legislation to come out of the Vietnam conflict was the War Powers Act, passed over a Presidential veto, November 7, 1973. The measure, which was designed to limit Presidential authority to commit armed forces in the absence of Congressional approval, will be discussed in detail in a separate chapter.[87]

III. The Courts and the Indochina Conflict

In no case did the United States Supreme Court con-

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[85]Armed Forces Appropriation Authorization, 1972, Pub. L. 92-156, sec. 601, 85 Stat. 423 (1971); Congress and The Nation, pp. 916,919.

[86]Congressional Quarterly Almanac 29 (1973): 95, 861; Second Supplemental Appropriations Act, 1973, Pub. L. 93-50, sec. 307, 87 Stat. 99 (1973).

[87]87 Stat. 555 (1973); New York Times, 8 November 1973, p. 1.

sider on the merits the legality of the southeast Asian war. It repeatedly denied petitions for the writ of certiorari, and even summarily refused a State's motion for leave to file a bill of complaint in an original proceeding.[88]

In Atlee v. Richardson, the high Court gave us the strongest hint as to how it would handle legal challenges to the war, when it affirmed without comment the lower court decision. Atlee had asked a United States District Court in Pennsylvania to declare the southeast Asian war illegal by virtue of conflict with various Constitutional and treaty provisions, and to enjoin further expenditures for it.[89]

The District Court granted the Government's motion to dismiss on the ground that the suit was non-justiciable. The Court noted several difficulties in deciding cases involving foreign affairs: in getting and managing the facts, in foreseeing the legal consequences of its ruling, and in developing standards to apply.[90]

Furthermore, the judges found a decision on the merits in this case to involve some unanswerable questions. They would have to resolve whether or not the hostilities

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[88]Louis Henkin, Foreign Affairs and the Constitution (Mineola, N.Y.: The Foundation Press, Inc., 1972), pp. 210, 214; Massachusetts v. Laird, 400 U.S. 886 (1970).

[89]Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), aff'd sub nom. Atlee v. Richardson, 411 U. S. 911 (1973).

[90]347 F. Supp. 689, 702 (E.D. Pa. 1972).

amounted to "war," and this, they said, is a "political" question. Secondly, they would have to determine whether or not Congress authorized the conflict, which would require divining the intent of the legislators. Finally, they would have to decide whether or not the President has the authority to maintain troops in combat, a question so linked to a determination of the "security interests" of the United States that it should not be decided by a court.[91]

One judge dissented, thinking the issue justiciable. And when Atlee was affirmed by the Supreme Court without explanation, Justices Douglas, Brennan and Stewart averred that they would note probable jurisdiction and set the case for oral argument. But the majority of the high court thought otherwise, and the clear inference is that they too believed the legal challenges to the Vietnam war to be non-justiciable.[92]

Certainly they were offered sufficient opportunity to make use of another legal vehicle to resolve the issue, and yet the Court consistently declined to grant certiorari. The Justices even went so far as to agree over the telephone during their summer recess to overrule a colleague whose order would have left standing a successful lower court chal-

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[91]Ibid., pp. 703-7.

[92]Ibid., pp. 709-13; 411 U. S. 911 (1973).

lenge to the bombing in Cambodia following the Vietnam cease-fire.[93]

Lower federal courts were also reluctant to tackle head on challenges to the legality of the war. Availing themselves of the doctrines of "political questions," non-justiciability, lack of standing to sue, and sovereign immunity, lower courts avoided decisions on the merits.[94]

When, however, lower federal courts did reach the merits they invariably ruled in behalf of the government and against those challenging the conduct of the war. In the

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[93]Holtzman v. Schlesinger, 414 U.S. 1321 (1973). The Supreme Court denied certiorari in the following constitutional challenges to the southeast Asia conflict: Ashton v. United States, 394 U.S. 960 (1969); Da Costa v. Laird, 405 U.S. 979 (1972); Hart v. United States, 391 U.S. 956 (1968); Holmes v. United States, 391 U.S. 936 (1968); Holtzman v. Schlesinger, 416 U.S. 936 (1974); Luftig v. McNamara, 387 U.S. 945 (1967); McArthur v. Clifford, 393 U.S. 1002 (1968); Massachusetts v. Laird, 400 U.S. 886 (1970); Mitchell v. United States, 386 U.S. 972 (1967); Mora v. McNamara, 399 U. S. 934 (1967); Orlando v. Laird, 404 U.S. 869 (1971); Sarnoff v. Shultz, 409 U.S. 929 (1972); Velvel v. Nixon, 396 U.S. 1042 (1970).

[94]See Ashton v. United States, 404 F. 2d 95 (8th Cir. 1968); Atlee v. Laird, 347 F. Supp. 689 (E.D.Pa. 1972); Bernath v. Nixon, 347 F. Supp. 689 (E.D. Pa. 1972); Campen v. Nixon, 56 F.R.D. 404 (N.D. Cal. 1972); Da Costa v. Laird, 471 F. 2d 1146 (2d Cir. 1973); Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973), aff'd, 502 F. 2d 1158 (1st Cir. 1973); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972); Head v. Nixon, 342 F. Supp. 521 (E.D. La. 1972), aff'd, 468 F. 2d 951 (5th Cir. 1972); Holtzman v. Schlesinger, 484 F. 2d 1307 (2d Cir. 1973); Luftig v. McNamara, 373 F. 2d 664 (D.C. Cir. 1967); Mora v. McNamara, 387 F. 2d 862 (D.C. Cir. 1967); Mottola v. Nixon, 464 F. 2d 178 (9th Cir. 1972); Sarnoff v. Connally, 457 F. 2d 809 (9th Cir. 1972); Velvel v. Nixon, 415 F. 2d 236 (10th Cir. 1969).

Mottola and Holtzman cases, where anti-war litigants were initially successful, circuit courts reversed the judgments.[95]

Typical of the lower courts decisions on the merits is Orlando v. Laird, decided by the Second Circuit Court of Appeals in 1971. Orlando, an enlistee, sued to keep from being sent to Vietnam. He argued that the Executive branch lacked authority to compel him to participate in a conflict not expressly authorized by Congress, which alone has the power to declare war, United States Constitution, Article I, section 8, paragraph 11.[96]

The court held that I, 8, 11 requires "mutual participation" by the Congress "in the prosecution of the war," and in the case of Vietnam such participation was initially evidenced by the Gulf of Tonkin Resolution and thereafter by appropriations for military operations and by extensions of

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[95]Lower federal courts reached the merits in the following: Berk v. Laird, 429 F. 2d 302 (2d Cir. 1970), 443 F. 2d 1039 (2d Cir. 1971); Da Costa v. Laird, 448 F. 2d 1368 (2d Cir. 1971); Holtzman v. Richardson, 361 F. Supp. 544 (E. D.N.Y. 1973); Holtzman v. Schlesinger, 361 F. Supp. 553 (E. D.N.Y. 1973), rev'd, 484 F. 2d 1307 (2d Cir. 1973); McArthur v. Clifford, 402 F. 2d 58 (4th Cir. 1968); Meyers v. Nixon, 339 F. Supp. 1388 (S.D.N.Y. 1972); Mitchell v. Laird, 488 F. 2d 611 (D.C. Cir. 1973); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970), rev'd, 464 F. 2d 178 (9th Cir. 1972); Orlando v. Laird, 443 F. 2d 1039 (2d Cir. 1971); United States v. Hart, 382 F. 2d 1020 (3d Cir. 1967); United States v. Holmes, 387 F. 2d 781 (7th Cir. 1967); United States v. Kronke, 459 F. 2d 697 (2d Cir. 1972); United States v. Mitchell, 369 F. 2d 323 (2d Cir. 1966); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968).

[96]443 F. 2d 1039, 1040-1041 (2d Cir. 1971).

the draft.[97]

Orlando contended that military appropriations were inadequate as ratification of the war because they were made in response to a Presidential fait accompli. Furthermore, Congress had already repealed the Tonkin Resolution. The court noted that the Tonkin repeal came when the Resolution "was no longer necessary and amounted to no more than a gesture on the part of the Congress . . ."[98]

The court went on to reject the assertion that Congressional authorization for a war could not be inferred from appropriations:

> The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war . . .[99]

Thus Orlando lost his suit, and the Vietnam War found judicial sanction, at least in the second circuit. Senator Fulbright denounced the Orlando rule as "utterly inconsistent" with attempts to preserve Congressional warmaking power. And Senator Stennis added that military appropriations have too many "ingredients" to be considered "an endorsement

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[97]Ibid., p. 1042.

[98]Ibid., pp. 1040-1041, note 1, p. 1041.

[99]Ibid., p. 1043.

of the war.[100]

Orlando petitioned the Supreme Court for a writ of certiorari, but was denied, Justices Douglas and Brennan dissenting.[101] Meanwhile the second circuit stuck by its Orlando rule, reaffirming it in the similar case of Da Costa v. Laird. The Supreme Court again refused certiorari over the disagreement of Brennan and Douglas. The latter commented that "the constitutional questions raised by conscription for a presidential war are both substantial and justiciable."[102]

The Orlando rule was applied a bit differently (by Judge Judd, one of its creators) in Congresswoman Holtzman's suit to enjoin military operations in Cambodia in the summer of 1973. Applying Orlando, the district court held that Congressional authorization was necessary for the bombing of Cambodia, only this time the court held that "appropriations bills do not necessarily indicate . . . approval . . ."[103]

The district court ruled in favor of Holtzman only to have its orders stayed by the circuit court pending appeal. Supreme Court Justice Marshall refused to vacate the stay, but Douglas agreed a few days later and was promptly

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[100]Anthony A. D'Amato and Robert M. O'Neil, The Judiciary and Vietnam (New York: St. Martin's Press, Inc., 1972), p. 77

[101]404 U. S. 869 (1971).

[102]448 F. 2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972).

[103]Holtzman v. Schlesinger, 361 F. Supp. 553, 562 (E. D. N. Y. 1973).

countermanded the same afternoon following a telephonic exchange among the justices. Following this byplay the second circuit reversed the lower court's orders on the grounds that determining if the operations in Cambodia represented a new conflict requiring Congressional approval or a tactical decision within the authority of the commander-in-chief was a "political question."[104]

In summation, the federal courts were for the most part unwilling to adjudicate challenges to the legality of the southeast Asia conflict. Only lower federal courts were willing to reach the merits, in 13 cases, all of which were favorable to the government at the circuit level. The Supreme Court consistently denied certiorari, breaking stride only to affirm a district court decision that the anti-war suit in question was non-justiciable.[105]

Not all the Supreme Court justices were content to duck the issue of the war's legality. Douglas dissented from his colleagues' refusals to grant certiorari about a dozen times, occasionally joined by Justices Stewart and/or Brennan. In the case of Mora v. McNamara, Stewart's protest against the Court's unwillingness to take the case provides

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[104]Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973); 484 F. 2d 1307 (2d Cir. 1973).

[105]See notes 93-95, supra; Atlee v. Richardson, 411 U.S. 911 (1973).

us with a suggestive formula for examining the constitutionality of the conflict.[106]

Mora, an army private, sought an injunction to prevent his transfer to Vietnam on the grounds that the war was being conducted illegally. The District of Columbia Court of Appeals dismissed his suit as inappropriate for judicial resolution. Mora's petition for a writ of certiorari was denied, Douglas and Stewart dissenting. Stewart urged the Court to answer the following questions.

(1) Is the Vietnam conflict a "war" within the meaning of Article I, section 8, clause 11 of the Constitution? (2) If so, may soldiers be compelled to participate despite the absence of a Congressional declaration of war? (3) Of what relevance are United States treaty obligations? (4) Of what relevance is the Tonkin Gulf Resolution? Do present military operations fall within its terms? Is the Resolution an unlawful delegation of Congressional power to the President?[107]

IV. The Vietnam War and The Constitution

The questions raised by Justice Stewart in the Mora case provide a suggestive basis for analyzing the constitu-

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[106] 387 F. 2d 862 (D.C. Cir. 1967), cert. denied, 389 U.S. 934 (1967).

[107] 389 U. S. 934-935 (1967).

tionality of the conflict. One might also wish to take into account the effect of military appropriations and extensions of the draft, the relevance of historical precedent, and the extent of sole Presidential authority under Article II.

We will consider several of these questions, all with an eye toward assessing the effect of the Vietnam war upon Presidential war-making powers.

Was the conflict a "war" within the meaning of Article I, section 8, clause 11? Certainly it was not an all-out conflict in terms of American military potential. Furthermore, hostilities were confined to a small geographical area, and Congress had never formally declared war.

Nevertheless, the sustained bombing of the D.R.V. did constitute an attack upon a de facto international entity, even if one that lacked some of the attributes of sovereignty. And a conflict so protracted (lasting over 7½ years), of such magnitude (involving over one-half million American ground combat troops at one point), and so damaging to the United States (over 46,000 killed, 153,000 wounded), would seem to defy exclusion from the category of "wars."

A. Effect of the SEATO Treaty

Under Article IV, paragraph 1 of the SEATO pact, the United States agreed that "aggression by means of armed attack" against any of the parties to the Treaty or any state or territory designated in the accompanying Protocol, "would

endanger its own peace and safety," and that in such an event the United States would "act to meet the common danger in accordance with its constitutional processes."[108]

In the view of the United States government, the infiltration of armed men from North to South Vietnam constituted aggression by armed attack, and thus justified American action under Article IV,paragraph 1, of SEATO. (The claim that an "armed attack" occurred is controversial in the absence of a Korean style invasion across the 17th parallel. Article IV, paragraph 2, of SEATO provides for immediate consultation among signatories in order to agree upon defense measures in the event of threats "other than by armed attack," and this provision may have been more appropriately invoked. The United States Congress supported the claim that North Vietnam was guilty of "aggression . . . against its neighbors" in the Preamble to the Tonkin Resolution.)[109]

In a Memorandum of Law, the State Department asserted that SEATO served in part as authorization for Presidential decisions with respect to Vietnam. The reasoning is as follows. Under Article VI of the Constitution, treaties are

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[108] SEATO, Art. IV, par. 1.

[109] U. S., Department of State, Office of the Legal Adviser, Memorandum of Law, "The Legality of United States Participation in the Defense of Viet-Nam," in Richard A. Falk, ed., The Vietnam War and International Law, 4 vols. (Princeton, N.J.: Princeton University Press, 1968-1976), 1 (1968):583; 78 Stat.384; see Richard A. Falk, "International Law and the United States Role in the Viet Nam War," in Falk, 1 (1968):391; Hull and Novogrod, pp. 139-47.

the supreme law of the land. Thus it is asserted that Article IV, paragraph 1 of the SEATO treaty

> establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States.[110]

Should such an attack occur, it is argued, the United States "has undertaken a commitment" in Article IV, paragraph 1 of SEATO to "act" to meet the danger. "Under our Constitution," the Memorandum declares,

> it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U. S. forces to South Viet-Nam is required, and that military measures against the source of Communist aggression in North Viet-Nam are necessary, he is constitutionally empowered to take those measures.[111]

In sum, the position of the State Department is that SEATO empowers the President to send ground troops to South Vietnam and bomb North Vietnam, provided only that he recognize the occurrence of an armed attack on the GVN.

While it is doubtless true that SEATO obligated the United States to act in some manner to aid in the defense of South Vietnam in the event of an armed attack, and while it is the President's responsibility to recognize the circumstances under which treaty provisions are triggered, it is

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[110] Falk, 1 (1968):597.

[111] Ibid., pp. 597-598.

not at all clear that the President may unilaterally execute that treaty, especially where the execution involves placing the country at war.

In fact, Article IV, paragraph 1 of SEATO calls for the United States to "act . . . in accordance with its constitutional processes," and the Congressional debates preceding approval of the treaty make it clear that SEATO did not commit the United States to military action without prior approval by Congress. This being the original understanding of the treaty, it could hardly be said to empower the President to unilaterally order air attacks on the alleged aggressor state (North Vietnam) and large numbers of combat troops into the area designated by Protocol (South Vietnam).[112]

A more reasonable interpretation is that SEATO obligated the United States to act in the defense of South Vietnam, and the President was authorized to implement the treaty short of placing the United States at war without Congressional approval. This would be more consistent with both the "constitutional processes" stipulation of SEATO and Article I, section 8, clause 11 of the Constitution.

But as the Legal Memorandum points out, Congress did approve Presidential use of armed forces for Vietnam when it

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[112]Hull and Novogrod, pp. 147-148.

passed the Gulf of Tonkin Resolution in August, 1964. We must determine whether or not this act authorized the extensive hostilities that followed, and, if so, was it an unwarranted delegation of Congressional war power.[113]

B. Effect of the Tonkin Resolution

Much controversy surrounds the meaning of the Gulf of Tonkin Resolution. In Senate testimony, then Under Secretary of State Nicholas deB. Katzenbach asserted that in terms of the constitutional requirement of legislative approval the Resolution was the "functional equivalent" of a declaration of war.[114]

Several legislators reacted sharply to Katzenbach's testimony, insisting that in voting for the Resolution they never intended to authorize the extensive and prolonged military operations that ensued. (For example, Senator Gore (D-Tenn.) replied to Katzenbach: "I did not vote for the resolution with any understanding that it was tantamount to a declaration of war.")[115]

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[113]Falk, 1 (1968):598.

[114]U.S., Congress, Senate, United States Commitments to Foreign Powers, Hearings before the Committee on Foreign Relations, 90th Cong., 1st sess., 1967, pp. 82, 88.

[115]Ibid., pp. 83, 87, 88, 89, 131, 145, 209. But contrast the views of Senators Ervin and Cooper, ibid., pp. 165, 197-198, 213.

Later the Senate Foreign Relations Committee confessed that "there was a discrepancy between the language of the {Tonkin} resolution and the intent of Congress," that the wording "lends itself to the interpretation that Congress was consenting in advance to a full-scale war."[116]

In section 1 of the Resolution, Congress stated that it "approves and supports the determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."[117]

In the floor debates, Senator Fulbright, the bill's manager, explained that the phrase "further aggression" applied to future aggression against either the United States or South Vietnam. Thus, the resolution provided advance support for measures, including presumably armed force, taken by the President in order to prevent further aggression against the GVN.[118]

The second section announced that the United States is "prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist" any SEATO member or Protocol state requesting "assistance

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[116]U. S. Congress, Senate, National Commitments, S. Rept. 797 to Accompany S. Res. 85, 90th Cong. 1st sess.,1967, p. 21.

[117]78 Stat. 384, emphasis added.

[118]110 Cong. Rec. 18405 (1964).

in defense of its freedom."[119]

A colloquy between Senators Fulbright and Cooper suggests that this section triggered the defense provisions of SEATO, Article IV. It is also clear that the President was thereby authorized (or perhaps only recognized as having the power) to unilaterally dispatch armed forces to aid South Vietnam.[120]

In short, the protesting Senators were probably sincere when they said that they never intended to approve military operations of the magnitude of those in Vietnam. Apparently they simply never anticipated what would develop. At the same time the Johnson Administration was on firm ground when it claimed that the Resolution authorized the use of the armed forces in South Vietnam and against North Vietnam.[121]

If the Tonkin Resolution empowers the President to dispatch combat troops to Vietnam, does it do so in violation of the Constitution? Does it delegate to the Executive the war-making power which is reserved to the legislature under Article I, section 8, clause 11? If so, it has been asserted that the act is null and void for having violated the princi-

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[119] 78 Stat. 384, emphasis added.

[120] 110 Cong. Rec. 18409-18410 (1964); see text accompanying note 50, supra.

[121] Falk, 1 (1968):598.

ple of the Separation of Powers.[122]

The standards used by the Supreme Court in determining excessive delegation are rather vague, and since United States v. Curtiss-Wright (1936), have been much less stringent in foreign than in domestic affairs. Even in domestic affairs, although the doctrines enunciated in Panama Refining v. Ryan (1935) and Schechter Poultry v. United States (1935), are probably still vital, no domestic delegation has been struck down since.[123]

Furthermore, the Tonkin Resolution is not unprecedented; Presidents had been similarly authorized to use the armed forces at their discretion by the Formosa Resolution of 1955, the Middle East Resolution of 1957, and the Cuba Resolution of 1962. Thus, given contemporary legal standards and practice, it is doubtful that the Tonkin Resolution would be considered unconstitutional on these grounds.[124]

The Southeast Asia Resolution is assailable on another ground; that it was obtained through misrepresentation by the Administration of the Gulf of Tonkin incidents. It

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[122]Francis D. Wormuth, "The Vietnam War: The President versus the Constitution," in Falk, 2 (1969):781-99; Lawrence R. Velvel, "The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable," in Falk 2 (1969):680.

[123]Henkin, pp. 119-120, note 95, p. 366.

[124]Southeast Asia Resolution Hearing, p. 3; Falk 1 (1968):580-82; John Norton Moore, "The National Executive and the Use of the Armed Forces Abroad," in Falk 2 (1969): 817.

is true that prior to consideration of the Resolution Congress was never fully informed that the United States destroyers were on reconnaissance missions, or that the United States secretly directed South Vietnamese coastal raids on the days preceding each of the attacks, or that there was confusion in the reports on the second incident in the Gulf.[125]

Nevertheless, Congress knew a great deal, could have been expected to investigate to learn more, and in any case need not have approved a measure as broad as the one adopted. Administrations invariably present facts in a way designed to marshal support for their policies; this does not affect the constitutionality of the legislative end-product.

In short, although the Administration may have been deceptive, and the Congress hasty in approving it, the Tonkin Gulf Resolution did provide authority for the hostilities that followed. And if such a resolution were requested at the start of the sustained air bombardment of North Vietnam in February, 1965, or in the summer of 1965, with the introduction of large numbers of American ground forces, I have little doubt that it too would have received legislative approval.

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[125]Compare Southeast Asia Resolution Hearing (1964) and The Gulf of Tonkin: The 1964 Incidents Hearing (1968); See also Austin, pp. 182-183 and passim.

C. Other Sources of Authority

Did Congress manifest approval of the Vietnam conflict in other ways, viz., by military appropriations and extensions of the draft? A positive answer was given by the Second Circuit Court of Appeals in the Orlando and Da Costa cases, where it was contended that such legislation is evidence of "mutual participation" by Congress in the decisions to prosecute the war.[126]

In opposition it is argued that such legislation is not a good indicator of Congressional support for a war policy because (1) it provides for national defense in general and is not just related to the war; and (2) Congress has no choice but to supply and protect troops already sent into battle by the President.[127]

We saw that when President Johnson requested a special appropriation of $700 million in May, 1965, specifically earmarked for the growing Vietnam conflict, Congress approved overwhelmingly while a number of legislators denied that their votes were to be construed as assent to a war. And similar scenes recurred in successive years, with Congressmen voting the money while condemning the war.[128]

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[126]See notes 96-102 and accompanying text, supra.

[127]Velvel, in Falk, 2 (1969):667; D'Amato and O'Neil, pp. 77-78; compare Mitchell v. Laird, 488 F. 2d 611 (D.C. Cir. 1973).

[128]See notes 71-75 and accompanying text, supra; Hull and Novogrod, pp. 180-83.

Nevertheless, if Congress has not specified its policy intentions, and the legislative history is ambiguous in this respect, it is difficult to see how such laws can be equated with an express declaration of war. This is especially true where the legislation establishes or pays for programs not necessarily related to the war, e.g., the draft, which the United States conducted in peacetime as well as during the Vietnam War.

The willingness of Congress to appropriate the billions of dollars used to conduct the Vietnam War must, however, be considered at least indirect legislative approval of the confict, just as the laws to cut off military expenditures in Cambodia display Congressional disapproval. Beyond providing evidence of indirect support, the constitutional relevance of such legislation to war making is in doubt.

D. Effect of Vietnam Upon Presidential War Power

In terms of the President's constitutional authority to initiate major armed conflicts, what kind of precedent is established by the Vietnam hostilities? Assuming that it was a "war" in the Article I, section 8, clause 11 sense of the word, then it was fought without a formal declaration of war by Congress.

The only express Congressional authorization came

by joint resolution vesting in the President the power to determine what "steps, including the use of armed force" the United States would take in defense of any SEATO member or Protocol state. The resolution was approved one-half a year before sustained air attacks on North Vietnam began, and about nine months before large numbers of American ground combat troops were dispatched to South Vietnam.

Thus, the Vietnam hostilities set a precedent for a war being fought after a joint resolution recognized Presidential discretion in using armed force to uphold provisions of a collective security treaty. (There is some confusion about the role of SEATO. Consider the statement of Secretary of State Dean Rusk, that the SEATO pact is "the substantiating basis for our presence" in Vietnam, but that "we are not acting specifically under the SEATO Treaty." But the Secretary may have been trying to justify the failure of the United States to undertake collective action with respect to Southeast Asia, as anticipated by the Treaty.)[129]

At times both the Johnson and Nixon Administrations made more extreme claims for Presidential power, claims that the President had the authority to make the Vietnam decisions without relying on the Tonkin Resolution. The Nixon Admin-

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[129] Southeast Asia Resolution Hearing, p. 23.

istration went so far as to disavow the Tonkin Resolution altogether, which in part led to its abrogation, effective January 12, 1971.[130]

In the absence of the Tonkin Resolution did the President, acting on his own constitutional authority have the power to order attacks upon North Vietnam and the commitment of large numbers of ground troops to hostilities in South Vietnam? While the answer must be based in part upon historical precedent, and while the Korean conflict would seem analogous, it is doubtful that the President can place the country at war without Congressional approval. (The Constitutional standards may differ in the case of a President who inherits on-going hostilities, as did Nixon, as opposed to one who initiates those hostilities.)

But if the Vietnam conflict led to extreme claims in behalf of Presidential war-making power, it also, ironically, spawned the first legislative attempt in United States history to explicitly curtail that power: the 1973 War Powers Act.

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[130]See text of President Johnson's Press Conference of 18 August 1967 in United States Commitments Hearings, p. 126; see Department of State Letter of 12 March 1970, in U. S. Congress, Senate, Vietnam Policy Proposals, Hearings before the Committee on Foreign Relations, 91st Cong., 2d sess., 1970, p. 311; 84 Stat. 2053 (1971).

CHAPTER IX

THE WAR POWERS RESOLUTION OF 1973

I. Background: Other Attempts to Limit the President

Out of dissatisfaction over the conflict in Southeast Asia came a number of Congressional attempts to restrict the war-making powers of the President. While the War Powers Resolution of 1973 has attracted the most attention and will be the focus of this essay at least three other approaches to limiting the Executive are worthy of note.[1]

The three other types of restrictions are, first, the National Commitments Resolution,[2] second, the various amendments to appropriation and authorizations measures prohibiting expenditures for military operations in Southeast Asia,[3]

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[1]War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973).

[2]S. Res. 85, 91st Cong., 1st sess., 115 Cong. Rec. 17245 (1969).

[3]I have found eleven measures: Department of Defense Appropriations Act, 1970, Pub. L. 91-171, sec. 643, 83 Stat. 469 (1969); Special Foreign Assistance Act of 1971, Publ L. 91-652, sec. 7(a), 84 Stat. 1942 (1971); Department of Defense Appropriation Act, 1971, Pub. L. 91-668, sec. 843, 84 Stat. 2020 (1971); Second Supplemental Appropriations Act, 1973, Pub.L. 93-50, sec. 307, 87 Stat. 99 (1973); Continuing appropriations, 1974, Pub. L. 93-52, sec. 108, 87 Stat. 130 (1973); Department of State Appropriations Authorization Act of 1973, Pub. L. 93-126, sec. 13, 87 Stat. 451 (1973); Department of Defense Appropriation Authorization Act, 1974, Pub. L. 93-155, sec. 806, 87 Stat. 605 (1973); Foreign Assistance Act of 1973, Pub. L. 93-189, sec. 30, 87 Stat. 714 (1973); Department of Defense Appropriation Act, 1974, Pub. L.

and third, the Mansfield Amendment.[4]

The Commitments Resolution was a sense-of-the-Senate measure, approved June 25, 1970. Since it was a simple (one-house) resolution it had no legally binding effect, and was therefore more of an expression of Senate dissatisfaction with the foreign policy making process. Its key passage declared it to be the sense of the Senate

> that a national commitment by the United States results only from affirmative action taken by the legislative and executive branches . . . by means of a treaty, statute, or concurrent resolution of both houses of Congress specifically providing for such commitment.[5]

A national commitment was defined as the "use of the armed forces" abroad or "a promise" of foreign assistance, either military or financial. From the standpoint of encouraging Congressional participation in use-of-force decisions, the Resolution had some obvious weaknesses. First, of course, was its lack of binding force. The Senate Foreign Relations Committee which prepared the measure called it "an invitation

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L. 93-238, sec. 741, 87 Stat. 1026 (1974); Continuing Appropriations, 1975, Pub. L. 93-324, sec. 110, 88 Stat. 281 (1974); Department of Defense Appropriation Act, 1975, Pub. L. 93-437, sec. 839, 88 Stat. 1212 (1974).

[4]Armed Forces Appropriation Authorization, 1972, Pub. L. 92-156, sec. 601, 85 Stat. 423 (1971).

[5]S. Res. 85, 91st Cong., 1st sess., 115 Cong. Rec. 17245 (1969).

to the executive to reconsider its excesses," and although the tone of this statement is tough, the fact that it was an "invitation" rather than a directive says a great deal.[6]

Second is the fact that only one chamber of Congress approved the measure, and it is doubtful that the House of Representatives would have approved such a resolution at that time. The implication, of course, is that the other house was not as dissatisfied with foreign policy making procedure.

Third, the language of the Resolution is vague in that it does not say just what kind of Congressional "affirmative action" is required before a commitment is made. Since it calls for a "treaty, statute, or concurrent resolution" without designating which is appropriate, and without establishing a procedure for implementation (who decides whether the requirements of the measure have been met?), much is left unclear.

For example, the language could be interpreted to mean that a mutual defense treaty alone is adequate Congressional authorization for American participation in hostilities in defense of the treaty partner although a treaty

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[6]U.S., Congress, Senate, National Commitments, S. Rept. 129 to Accompany S. Res. 85, 91st Cong., 1st sess., 1969, p. 30.

involves no House action at all.[7] It could also be read to say that a non-binding concurrent resolution approved after a troop commitment has been made by the President is sufficient to authorize his action, despite the absence of any prior consultation.

Fourth, the measure did not alter already existing commitments, either to Vietnam or to American treaty partners.

In short, Senate Resolution 85 did not influence the division of war-making power between Congress and the President. It served as a warning that there was growing dissatisfaction with this division amongst Senators at least, as well as increased skepticism regarding the extent of such commitments. In reviewing the background leading up to one of the War Powers proposals, the Senate Foreign Relations Committee acknowledged the failure of the National Commitments Resolution as a factor encouraging additional Congressional action.[8]

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[7]The requirement of specificity would seem to strengthen the Resolution here, except that no standard is offered for judging the degree of specificity required. Was, e.g., SEATO specific enough to warrant the commitment of American troops to South Vietnam? In article IV, section 1 of SEATO the United States pledged to "act to meet the common danger" in the event of aggression by means of armed attack against the parties or those named in an accompanying Protocol. U.S., Department of State, United States Treaties and Other International Agreements, vol. 6, pt. 1, "Southeast Asia Collective Defense," TIAS No. 3170, 8 September 1954.

[8]U.S., Congress, Senate, War Powers, S. Rept. 220 to Accompany S. 440, 93d Cong. 1st sess., 1973, pp. 4-5.

The second approach to restricting Presidential war power--cutting off funds--was more effective and therefore more significant. The first two measures of this nature had no effect upon actual combat. The rider to the Defense Appropriations Act of 1970 prohibited expenditures from that measure for the introduction of United States ground combat troops in Laos and Thailand.[9] Since the United States had no ground troops in either of those countries, the United States air war could continue without running afoul of this provision.

Furthermore, the measure did not prohibit the introduction of ground troops into Cambodia, thus making it inapplicable to the 1970 Cambodian incursion. This latter event prompted the second funds cut-off measure, contained in the Special Foreign Assistance Act of 1971.[10]

While this provision cut off all funds for ground forces or even advisers in Cambodia, Congress delayed appro-

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[9]83 Stat. 469 (1969). Section 643 of the Act reads as follows: "In line with the expressed intention of the President of the United States, none of the funds appropriated by the Act shall be used to finance the introduction of American ground troops into Laos or Thailand.

[10]84 Stat. 1942 (1971). Section 7(a) of the Act says: "In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia."

val of the cut-off provision until June 30, 1970, the day President Nixon had said the Cambodian operation would end. In addition, by the time Congress cleared the entire measure, in December, 1970, and the President signed it into law on January 5, 1971, it was one half year since the United States had had ground troops in Cambodia.

The third and fourth measures were much more significant, since they appear to be the first acts ever to terminate completely all expenditures for United States combat forces while they were conducting a military operation. The background was the air bombardment of Cambodia which continued after United States military involvement in Vietnam had ended in March 1973.

After much debate Congress cleared on June 26, 1973, an appropriations measure containing a rider which called for an immediate cut-off of all funds for combat activities in or over Cambodia and Laos.[11]

The next day President Nixon vetoed the measure, declaring that "the 'Cambodian rider' to this bill would cripple or destroy the chances for an effective negotiated settlement in Cambodia . . . "[12] Congress sustained the veto, but it was essential to the continued smooth functioning of

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[11]H. R. 7447, 93d Cong., 1st sess. (1973).

[12]Congressional Quarterly, Congressional Quarterly Almanac, vol. XXIX, 1973 (Washington, D.C.: Congressional Quarterly, Inc. 1974), p. 66-A.

a number of governmental agencies that this and another funding measure go into effect on July 1.

The dramatic deadlock was broken when key legislators and administrative representatives agreed to a compromise. The President would sign measures containing a complete funds cut-off which would not take effect until August 15, 1973. The key provision, section 307 of Public Law 93-50 reads as follows.

> None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose.

Note that this provision terminates immediately all expenditures based upon Public Law 93-50, and prohibits as of August 15 expenditures based upon any other existing appropriations measure. The immediate cut-off was academic because none of the funds in Public Law 93-50 could be used for military operations in Cambodia.

Public Law 93-50, the second Supplementary Appropriations Act, was cleared on June 29. The following day, the other appropriations bill, Public Law 93-52, was approved. Section 108 of Public Law 93-52 stipulated the following.

> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activitiees by the United States military forces in or over or from off the shores of North Vietnam, South Vietnam. Laos or Cambodia.

Most significantly, in a letter of August 3, 1973, to the Speaker of the House and Senate Majority Leader, the President, while complaining about the policy effects of the cut-off, seemed to accept Congress's authority over the matter. "By legislative action," Nixon wrote,

> the Congress has required an end to American bombing in Cambodia on August 15th. The wording of the Cambodian rider is unmistakable; its intent is clear. The Congress has expressed its will in the form of law and the Administration will obey that law.[13]

Thus did the Congress use its appropriations power to restrict the authority of the Commander-in-Chief. To drive home the point Congress passed at least six other measures in 1973 and 1974 with funds cut-off provisions similar to those in Public Law 93-50 and Public Law 93-52, above.[14] None of these six acts cleared Congress while United States forces were engaged in hostilities in Southeast Asia.

However, seven of these fund cut-off laws were in force and seemed applicable to the United States efforts to evacuate American and Asian nationals when the communists took control in South Vietnam and Cambodia in the Spring of

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[13]Ibid., p. 862.

[14]Public Law 93-126, section 13 (1973) was broader in that it forbade use of any future appropriations for Indochina combat operations without Congressional consent. The five other acts were: Pub. L. 93-155, sec. 806 (1973), Pub. L. 93-189, sec. 30 (1973), Pub. L. 93-238, sec. 741 (1974), Pub. L. 93-324, sec. 110 (1974), and Pub. L. 93-437, sec. 839 (1974).

1975.[15] Initially, the Ford administration requested that Congress "clarify" these restrictions.[16]

When no clarification was forthcoming, the President went ahead with the various rescue operations anyway--despite the fact that they involved combat troops and even some combat in Southeast Asia. Later, the State Department's legal adviser told a Congressional subcommittee that

> the funds limitation statutes were not intended to limit and could not limit the President's constitutional power to remove U. S. nationals from places of danger.[17]

To say that the statutes were not intended to prohibit rescue of Americans in Indochina by combat troops is to make a plausible although debatable assertion about legislative intent.[18] But to say that Congress could not by its

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[15]The seven laws said to be pertinent are: Pub. L. 93-50, sec. 307 (1973), Pub. L. 93-52, sec. 108 (1973), Pub. L. 93-126, sec. 13 (1973), Pub. L. 93-155, sec. 806 (1973), Pub. L. 93-189, sec. 30 (1973), Pub. L. 93-238, sec. 741 (1974), Pub. L. 93-437, sec. 839 (1974). Congressional Quarterly, Congressional Quarterly Almanac, vol. XXXI, 1975 (Washington, D.C.: Congressional Quarterly, Inc., 1976), p. 15.

[16]U.S., President, Address, "State of the World," April 10, 1975, in CQ Almanac, 1975, p. 14-A.

[17]U.S., Congress, House, War Powers: A Test of Compliance, Hearings before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations, 94th Cong., 1st sess., 1975, p. 11. (Hereinafter, Compliance Hearings).

[18]Congressman Bingham (D-N.Y.) disputed the proferred interpretation. He declared that "those (cut-off) provisions were put into the law to curtail what President Nixon at the time said was his authority as Commander in Chief to protect and safeguard the evacuation of American troops which was the reason he gave, for example, for going into Cambodia." Ibid., p. 17.

appropriations power[19] limit the President acting on his own authority as Commander-in-Chief[20] is to make a controversial constitutional argument entailing consideration of Congress' authority in general to limit the President when he is acting under constitutional warrant. This is the issue at the very heart of the War Powers Resolution controversy.

Purely in terms of legal precedent, the Vietnam War era presents one clear victory for Congressional appropriations power over the Commander-in-Chief and one probable defeat. The 1973 victory was dramatic, coming as it did while military operations were ongoing. That these same triumphant provisions were probably violated less than two years later is often overlooked.[21]

The third approach to limiting the President was the Mansfield Amendment, or rather Mansfield Amendments, for there were two such efforts. The first, attached to an extension of the draft,[22] was written as a "sense of the Congress" resolution, and therefore was without legally binding effect.

The second Mansfield Amendment was nearly identical, except that it attempted to declare the "policy of the United

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[19]U.S. Const., art. I, sec. 8, cl. 1; U.S. Const. art. I, sec. 9, cl. 7.

[20]Ibid., art. II, sec. 2.

[21]Michael J. Glennon, "Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions," Minnesota Law Review 60 (November 1975):21-22.

[22]Military Selective Service Act of 1967, amendments, Pub. L. 92-129, sec. 401, 85 Stat. 348 (1971).

States," not merely the "sense of the Congress."

> It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war . . . and an accounting for all Americans missing in action . . . . The Congress hereby urges and requests the President to implement the above expressed policy by initiating immediately the following actions:
>
> (1) Establishing a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release of all American prisoners of war . . . and an accounting for all Americans missing in action . . .
>
> (2) Negotiate with the Government of North Vietnam for an immediate cease-fire . . .
>
> (3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina in exchange for a corresponding series of phased releases of American prisoners of war . . .[23]

The implementation sections, including the setting of a final date for troop withdrawal, were clearly left to Presidential discretion; Congress only urged and requested that they be undertaken. The first part is more controversial: can Congress mandate United States policy respecting the termination of hostilities and is the President obligated to follow the legislative prescription?

Before signing on November 17, 1971, the Defense Procurement Authorization within which the Mansfield Amendment was contained, President Nixon made known his views on Con-

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[23]See note 4, supra.

gress' policy declaration.

> To avoid any possible misconceptions, I wish to emphasize that Section 601 of this Act--the so-called Mansfield amendment--does not represent the policies of this administration . . . (Section 601) is without binding force or effect and it does not reflect my judgment about the way in which the war should be brought to a conclusion. My signing of the bill that contains this section therefore, will not change the policies I have pursued . . .[24]

Chalk up another victory for the Executive branch; Nixon refused to alter his policies to conform with the Mansfield guidelines. The end result was that the Congressional declaration of policy on terminating hostilities, although part of an act signed into law, was totally ineffectual as a limitation on the President.

It should be noted, however, that there were two significant weaknesses in the Mansfield approach. First, although Congress declared to be United States policy withdrawal of troops by a "date certain," it declined to name the date, instead urging the President to do so. Second, the Amendment did not direct the President to do anything; it simply made a policy declaration and requested the President to implement it.

As a result, the second Mansfield approach was no more successful than would have been any other legally non-

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[24]Congressional Quarterly Service, Congress and the Nation, Volume III, 1969-1972 (Washington, D.C.: Congressional Quarterly, Inc., 1973), p. 919.

binding measure (such as the first Mansfield Amendment).

II. Legislative History of the War Powers Resolution

Contemporaneous with these various attempts to end United States military involvement in Southeast Asia was the effort to write a more permanent limitation upon Presidential power into law. In the wake of the Cambodian incursion, announced by President Nixon on April 29, 1970, several war power bills were introduced in both houses of Congress.[25]

On the House side, Clement Zablocki (D-Wis.), chairman of a Foreign Affairs subcommittee, held hearings starting in mid-June 1970, focusing much of the time on a bill, House Resolution 17598, introduced by Representative Fascell (D-Fla.). The subcommittee also gave careful consideration to a measure introduced by a member of the other chamber, Senator Javits (R-N.Y.) (Senate Bill 3964). The Fascell and Javits proposals both attempted to specify the circumstances under which the President could introduce forces into hostilities without Congressional approval.

Significantly, chairman Zablocki announced in late July that he found such an approach to be unacceptable. "I

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[25] A number of these early proposals are conveniently reproduced in U.S., Congress, House, Congress, the President and the War Powers, Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, 91st Cong., 2d sess., 1970, pp. 435-95. {Hereinafter, House Hearings, 1970}.

believe," Zablocki declared,

> it is simply impossible to spell out all the contingencies in which the President ought to be able to move quickly without the specific authorization of the Congress.[26]

The Nixon administration had taken the same position in testimony offered a few weeks earlier.[27] But the most significant thing about Zablocki's stand is that he never reversed it, and as a result the House and Senate adopted divergent approaches to war powers measures.

Following the close of hearings in early August 1970, the House subcommiteee met in executive sessions and drafted a relatively mild proposal, House Joint Resolution 1355, which was recommended to the full chamber. The measure reaffirms Congress' power to declare war, recognizes the President's authority to defend the United States and its citizens in certain emergency circumstances, and states that it is "the sense of Congress that whenever feasible the President should seek appropriate consultation with the Congress" before making use-of-force decisions.[28]

The most significant part of House Joint Resolution 1355 is the requirement that the President report "promptly"

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[26]Ibid., p. 266. See also p. 267.

[27]Ibid., p. 208.

[28]U.S., Congress, House, Concerning the War Powers of Congress and the President, H. Rept. 1547 to Accompany H. J. Res. 1355, 91st Cong., 2d sess., 1970.

to the Speaker of the House and President of the Senate whenever he makes certain commitments of United States armed forces without specific prior Congressional authorization.[29] Unlike the provision calling for consultation with Congress, the section requiring a report to Congressional officers is mandatory. And, unlike the Fascell and Javits bills (discussed above) there is no attempt to delineate the respective war-initiating powers of Congress and the President.[30]

On November 16, 1970, the House overwhelmingly approved House Joint Resolution 1355, by a 289-39 vote.[31] But when the Senate failed to act the measure died with the adjournment of the 91st Congress.

The House measure was reintroduced in the 92d Congress as House Joint Resolution 1 with only one modification: the sense of Congress provision calling for consultation now

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[29]A report is required whenever the President "(1) commits United States military forces to armed conflict; (2) commits military forces equipped for combat to the territory, airspace or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of United States forces, or for humanitarian or other peaceful purposes; or (3) substantially enlarges military forces already located in a foreign nation." Ibid., pp. 5-8.

[30]The Javits measure, S. 3964, differed in another significant respect. It provided for an automatic thirty day cut-off of hostilities conducted without a declaration of war unless Congress were to authorize an extension by "affirmative legislative action." Ibid., pp. 474-76.

[31]116 Cong. Rec. 37407-37408.

omitted the modifying phrase "whenever feasible."[32] In brief House hearings Administration spokesmen said that the resolution was "acceptable,"[33] and the House approved it on August 3, 1971.[34] Once again the bill died though, for want of Senate action.

However, the upper chamber was far from inactive on the war powers question. On the contrary, Senator Fulbright's (D-Ark.) Foreign Relations Committee held well-publicized hearings on various war powers proposals (most notably, a revised Javits measure, an Eagleton (D-Mo.) bill, and even offerings from conservative Senators Taft (R-Oh.) and Stennis (D-Miss.)--all of which delineated in some fashion the general circumstances under which presidents could deploy troops in the absence of Congressional sanction.[35]

Secretary of State William P. Rogers testified in opposition that the Senate bills attempted "to fix in detail, and to freeze, the allocation of the war power between the President and Congress," and he complained that they would

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[32]U.S., Congress, House, Concerning the War Powers of Congress and the President, H. Rept. 383 to Accompany H.J. Res. 1, 92d Cong., 1st sess., 1971, pp. 1-2.

[33]U.S., Congress, House, War Powers Legislation, Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, 92d Cong., 1st sess., 1971, p. 64. {Hereinafter, House Hearings 1971}.

[34]117 Cong. Rec. 28878.

[35]U.S., Congress, Senate, War Powers Legislation, Hearings before the Committee on Foreign Relations, 92d Cong., 1st sess., 1971. {Hereinafter, Senate Hearings 1971}.

"narrow the power given the President by the Constitution."[36]

Specifically Rogers thought the measures unconstitutional to the extent that they (1) restrict the President's authority to deploy forces abroad short of hostitilites, and (2) provide for congressional limitation or termination of military actions taken under the President's constitutional authority.[37] Constitutional authorities Alexander Bickel and J. N. Moore supported Rogers' second point but differed amongst themselves on his first contention.[38]

In 1972 the Senate Foreign Relations Committee distilled the various measures before it and favorably reported a modified Javits bill, Senate Bill 2956.[39] The key element of the bill was contained in section 3, which codified the war-making powers of the President. The Senate report described these powers as "emergency authorities," and added that they are

> recognized to be authority which the President enjoys in his independent Constitutional office as President/Commander-in-Chief.[40]

Senate Bill 2956 provided for unilateral Presidential

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[36]Ibid., p. 498.

[37]Ibid., p. 499.

[38]Ibid., pp. 557 (Bickel testimony), 470 (Moore testimony).

[39]U.S., Congress, Senate, War Powers, S. Rept. 606 to Accompany S. 2956, 92d Cong., 2d sess., 1972.

[40]Ibid., p. 4.

action in three sets of circumstances: first, in case of attack upon the United States or its possessions; second, in the event of attack upon United States armed forces abroad; and third, in instances of threats to the lives of United States citizens and nationals abroad.[41] It was recognized that the President could forestall, repel and retaliate in case of attack upon the United States or its possessions--in effect, reaffirming the doctrine of the Prize Cases.[42]

Attacks on armed forces abroad could be forestalled and repelled, but there was no provision for retaliation. And threatened nationals abroad could be protected while being evacuated as rapidly as possible.

The bill provided that the Armed Forces could be introduced into hostilities or "situations where imminent involvement in hostilities is clearly indicated by the circumstances," only in the three circumstances discussed above, plus, of course, when Congress declares war or provides "specific statutory authorization" for hostilities. The measure expressly denies that such authorization can be inferred from general military appropriations,[43] or from mutual defense treaties without further implementation by Congress.[44]

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[41]Ibid., p. 2.

[42]2 Bl. (U.S.) 635 (1863).

[43]This was aimed at the holding to the contrary of Orlando v. Laird, 443 F. 2d 1039 (2d Cir. 1971).

[44]S. 2956, sec. 4(d), 92d Cong., 2d sess., 118 Cong. Rec. 12611 (1972).

The other major features of the Senate bill are the automatic termination of hostilities after 30 days in the absence of a declaration of war or an explicit extension by Congress.[45] and the possibility of earlier termination by statute or joint resolution.[46] In revised form these two features reappear in the War Powers Resolution ultimately enacted by Congress in 1973.

In April, 1972, the Senate debated Senate Bill 2956 for a week.[47] Among rejected amendments was a Fulbright proposal to substitute for the codification of Presidential powers a simple recognition of Presidential power to respond to national emergencies and to prohibit Presidential first use of nuclear weapons.[48] Fulbright had expressed the fear that section 3 might inadvertently enhance Presidential war power.[49] and his proposal to eliminate the codification would have brought the Senate more into line with House thinking on this matter.

Also rejected were two Dominick (R-Colo.) amendments, one of which weakened the bill's attempt to circumscribe Pres-

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[45]Ibid., sec. 5.

[46]Ibid., sec. 6.

[47]118 Cong. Rec. 11583ff.

[48]Ibid., p. 12456.

[49]S. Rept. 92-606, pp. 24-25.

idential use of force pursuant to treaties,[50] and another expressly permitting retaliation in case of attacks on the Amred Forces.[51] Senators Dominick and Goldwater (R-Ariz.) led the fight against the bill, joined by liberal Senator McGee (D-Wyo.).[52] Senator Ervin (D-N.C.) opposed on constitutional grounds,[53] and even dovish Senator Cooper (D-Ky.) expressed reservations based upon his understanding of the Constitution.[54]

On April 13, 1972, the Senate approved Senate Bill 2956, along with three perfecting amendments offered by Senator Javits.[55] At this point both houses had passed war powers legislation; but the House and Senate measures differed considerably. In order to get the two bills to a conference committee, the House repassed its bill with the same designation, Senate Bill 2956, used in the upper chamber.[56] A conference committee did meet--once, in October, 1972. But the differences between the bills were so great, and the at-

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[50] 118 Cong. Rec. 12458.

[51] Ibid., p. 12588.

[52] Thomas F. Eagleton, War and Presidential Power (New York: Liveright Publishing Corporation, 1974), p. 131.

[53] 118 Cong. Rec. 12138-41.

[54] Ibid., p. 12578. See also S. Rept. 92-606, pp. 28-33.

[55] The vote was 68-16. 118 Cong. Rec. 12611.

[56] U.S., Congress, House, Concerning the War Powers of Congress and the President, H. Rept. 1302 to Accompany S. 2956, 92d Cong., 2d sess., 1972, p. 2. S. 2956, amended, was passed by the House on August 14, 1972. 118 Cong. Rec. 28083.

mosphere was so dominated by the 1972 elections, that the war powers question was deferred until 1973.[57]

1973 was to be the pivotal year for war powers legislation. In March of that year Representative Zablocki's subcommittee held further hearings much of which were devoted to consideration of Senator Javits' proposal.[58] In May, the Subcommittee drafted House Joint Resolution 542, which was reported by the full Foreign Affairs Committee, four members opposing. House Joint Resolution 542 was the toughest measure to gain House committee approval to date.

Its most notable features as as follows. First, it directs the President to consult in every possible instance with the leadership and appropriations committees of Congress before making use-of-force decisions. Second, it requires a report whenever the President takes certain actions committing the Armed Forces. Third, it calls for an automatic termination of certain commitments after 120 days unless extended by Congress, or termination by concurrent resolution (not subject to Presidential veto) before the 120 day period ends.[59]

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[57]U.S., Congress, House, War Powers Resolution of 1973, H. Rept. 287 to Accompany H.J. Res. 542, 93d Cong., 1st sess., 1973, p. 2; Eagleton, p. 142.

[58]U.S., Congress, House, War Powers, Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, 93d Cong., 1st sess., 1973. {Hereinafter, House Hearings, 1973}.

[59]H. Rept. 93-287, pp. 5-11.

The differences between House Joint Resolution 542 and the Javits bill were apparent. While the Senate approach delineated in advance the circumstances under which the President would unilaterally commit forces, the House bill simply provided that certain Presidential actions trigger a report, and the termination procedures. And while the Javits measure called for automatic 30-day termination, or earlier by joint resolution, the Zablocki bill allowed 120 days before automatic cut-off, with the possibility of earlier termination by concurrent (veto-proof) resolution.

As the House Foreign Affairs Committee report indicated, the most controversial provisions of House Joint Resolution 542 would be the termination proposals. Seven Committee members expressed reservations about these provisions and four other members refused to sign the report mainly because of these provisions.[60]

The principle objections to the 120-day automatic termination were: (1) that it did not require affirmative action by the Congress, (2) that it could rob opponents of any incentive to negotiate, and (3) that it was unconstitutional when applied to actions taken under the Presidential independent constitutional authority. The concurrent resolution provision was opposed by some because there is doubt whether any act of Congress not subject to Presidential

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[60]Ibid., pp. 15-20.

approval or disapproval can have the force of law.[61]

With the Cambodian bombing controversy as backdrop, House debate began on June 25-27, 1973. House Democrats were fairly united in support and while Republicans opposed, their Policy Committee was unable to agree upon alternative amendments.[62]

The Nixon administration also opposed House Joint Resolution 542, threatening a veto because of the bill's allegedly dangerous and unconstitutional restrictions.[63] A vote was scheduled for July 18. On that day a number of substitute measures and amendments were considered. Representative Dennis (R-Ind.) offered a substitute providing Congressional approval or disapproval within 90 days of the President's action by "a bill or resolution appropriate to the purpose." This would have replaced the automatic 120-day termination and would have made the appropriateness of earlier cut-off by mere concurrent resolution unclear. The Dennis substitute was rejected, 166-250.[64]

A substitute by Congressman Eckhardt (D-Tex.) might have eliminated some of the constitutional difficulties of House Joint Resolution 542. It provided that Congress could

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[61]Ibid.

[62]CQ Almanac 1973, p. 910.

[63]119 Cong. Rec. 24663 (1973).

[64]Ibid., pp. 24654-24655, 24678 (1973).

direct disengagement by joint resolution, or declare that the President was trenching on Congressional authority through use of concurrent resolution. There would be no automatic termination provision. Other language suggested impeachment for failure to faithfully execute this law. The House did not see its merits, however, voting it down, 153-262.[65]

Also rejected were amendments to (1) require a vote of Congressional approval or disapproval within 120 days, form not specified,[66] (2) require disengagement only if Congress enacts "appropriate legislation" within 120 days,[67] (3) substitute an appropriate bill or resolution for the concurrent resolution clause,[68] (4) require a report and trigger the withdrawal mechanisms for all troop deployments, not just certain placements,[69] and (5) committee amendments to apply the bill to ongoing (i.e., Cambodian) hostilities.[70]

Having beaten back proposals to either weaken or strengthen the measure, the House then passed House Joint Resolution 542 by a 244-170 vote.[71]

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[65]Ibid., pp. 24678-24679, 24681.

[66]Ibid., p. 24694.

[67]Ibid., p. 24693.

[68]Ibid., p. 24695.

[69]Ibid., p. 24677.

[70]Ibid., p. 24684.

[71]Ibid., p. 24707.

COMPARISON OF SENATE BILL (SENATE 440 OF 7/20/73), HOUSE BILL (HOUSE JOINT RESOLUTION 542 OF 7/18/73) AND CONFERENCE COMMITTEE BILL (HOUSE JOINT RESOLUTION 542 OF 10/4/73)

PRIOR CONSULTATION	INITIAL TROOP COMMITMENT RESTRICTIONS	REPORTING/TERMINATION TRIGGER
1. House Bill Section 2. "The President in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent . . . 2. Senate Bill--Section 2. "it is the purpose of this Act to . . . insure that the collective judgment of both Congress and the President will apply to the introduction of the Armed Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is	1. House Bill--None. 2. Senate Bill--Section 3. "In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only-- (1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack; (2) to repel an armed attack against the Armed	1. House Bill--Section 3 "In any case in which the President without a declaration of war by the Congress--- (1) commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories, (2) commits United States Armed Forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair, or training of United States Armed Forces; or

PRIOR CONSULTATION	INITIAL TROOP COMMITMENT RESTRICTIONS	REPORTING/TERMINATION TRIGGER
clearly indicated by the circumstances . . ." 3. Conference Bill--Section 3. "The President in every possible instance shall consult with Congress before introducting United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . ."	Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack; (3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the(ir) lives . . . or (B) any country in which such citizens and nationals are being subjected to a direct and imminent threat to their lives. (4) pursuant to specific statutory authorization. . ." 3. Conference Bill--Section 2(c). "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations	(3) substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation . . ." 2. Senate Bill--Sec. 4 "The introduction of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act . . ." 3. Conference Bill--Section 4(a). "In the absence of a declaration of war, in any case in which United States Armed Forces are introduced-- (1) into hostilities or into situations where imminent involvement

PRIOR CONSULTATION	INITIAL TROOP COMMITMENT RESTRICTIONS	REPORTING/TERMINATION TRIGGER
	where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces . . ."	in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . ."

COMPARISON CONTINUED

REPORTING TIME, RECIPIENTS	AUTOMATIC TERMINATION	TERMINATION BY CONGRESS
1. House Bill--Section 3 ". . . the President shall submit within 72 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing . . ."	1. House Bill--Section 4(b) "Within 120 calendar days after a report is submitted or is required to be submitted pursuant to section 3, the President shall terminate any commitment and remove any enlargement of United States Armed Forces with respect to which such report was submitted, unless the Congress enacts a declaration of war or a specific authorization for the use of United States Armed Forces."	1. House Bill--Section 4(c). "Notwithstanding subsection (b), at any time that the United States Armed Forces are engaged in hostilities outside the . . . United States . . . without a declaration of war or other specific authorization of the Congress, such forces shall be disengaged by the President if the Congress so directs by concurrent resolution."
2. Senate Bill--Section 4 ". . . shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate . . ."	2. Senate Bill--Section 5 "The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall not be sustained beyond 30 days from the date of the introduction of such Armed	2. Senate Bill--Section 6. "The use of the Armed Forces of the United States in hostilities, or in any situation where imminent hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act may be terminated by an Act or
3. Conference Bill--Section 4(a) ". . . the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate, a report in writing . . ."		

COMPARISON CONTINUED

REPORTING TIME, RECIPIENTS	AUTOMATIC TERMINATION	TERMINATION BY CONGRESS
	Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the Armed Forces of the United States . . . requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement . . ." 3. Conference Bill--Sec-5(b). "Within 60 calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted) . . . Such 60 day period	joint resolution of Congress, except in a case where the President has determined and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities." 3. Conference Bill--Section 5(c). Identical to Section 4(c), above.

COMPARISON CONTINUED

REPORTING TIME, RECIPIENTS	AUTOMATIC TERMINATION	TERMINATION BY CONGRESS
	shall be extended for not more than an additional 30 days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."	

Two days later, the Senate adopted once again its version of the War Powers Resolution by a 72-18 vote.[72] The Senate measure, now designated Senate Bill 440, was virtually identical with the 1972 Javits bill (Senate Bill 2956).[73] Administration spokesmen had already made clear that the Senate measure was opposed[74] and the expectation of a veto seemed to obviate the need for a substantial opposition effort.[75]

Before Senate Bill 440 had been approved, two amendents of note were rejected. Senator Fulbright wished to add a clause empowering Congress to restrict or prohibit all major troop deployments by concurrent resolution. And Senator Eagleton tried unsuccessfully to extend the bill's coverage to all persons employed by or under contract with the United States government engaging in hostilities or advising foreign forces.[76]

A House-Senate conference committee first convened late in July, 1973,[77] with Fulbright, Mansfield, Symington,

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[72]S. 440, adopted July 20, 1973, 119 Cong. Rec. 25119.

[73]U.S., Congress, Senate, War Powers, S. Rept. 220 to Accompany S. 440, 93d Cong., 1st sess., 1973, p. 1.

[74]U.S., Congress, Senate, War Powers Legislation 1973, Hearings before the Committee on Foreign Relations, 93d Cong., 1st sess., 1973, p. 52. {Hereinafter, Senate Hearings 1973}. See also, House Hearings 1973, p. 129.

[75]CQ Almanac 1973, p. 914.

[76]The Fulbright amendment is at 119 Cong. Rec. 25091 (1973). Eagleton's is at ibid., p. 25092.

[77]Eagleton, p. 199.

Muskie, Aiken, Case and Javits from the upper chamber, and Representatives Zablocki, Morgan, Hays, Fraser, Mailliard, Fascell, Findley, Broomfield and Frelinghuysen serving as House conferees. Major concessions having been made by the Senators, the Conference Committee issued its report October 4, 1973.[78]

The most significant changes (the table below enables comparison of the July 1973 House and Senate measures and the Conference Committee bill) are as follows. The Senate language codifying Presidential war powers was trimmed considerably and reduced in importance. The House approach, designating certain troops commitments as the triggering mechanism for a Presidential report and termination procedures, was, with modifications, adopted instead.[79]

The automatic termination feature was maintained, but a 60 day period was adopted, with provision for 30 additional days in case of military necessity. Finally, the designated troop commitments could be terminated during the initial 60-day period by concurrent resolution not subject to Presidential veto.[80]

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[78]U.S., Congress, House, War Powers, H. Rept. 547 to Accompany H.J. Res. 542, 93d Cong., 1st sess., 1973. Mailliard and Frelinghuysen refused to sign the Report.

[79]Ibid.

[80]Ibid.

When the Conference bill was returned to the House and Senate in October, 1973, it ran into opposition both from those who felt the measure too restrictive of Presidential power, and those who viewed it as not restrictive enough.[81] The latter group reasoned that the virtual elimination of the codifiction of Presidential powers contained in the Senate bill had the effect of eliminating any prior restraint upon Presidential power to commit troops to hostilities. From their standpoint, the Conference bill permits 60 to 90 days of Presidentially-initiated war.[82]

However, in addition to the fact that Javits, Fulbright and Zablocki all urged passage, the Conference bill had other factors working in its behalf. President Nixon was becoming increasingly enveloped in the Watergate scandal and related matters, and his ability to defend Presidential prerogative against Congressional challenge was weakening.

On October 10, 1973, the day the Senate voted upon the Conference bill, Vice-President Agnew resigned his office. The Senate approved House Joint Resolution 542, 75 to 20.[83] Two days later the House approved the measure, 238-123, and it was sent to Nixon for an almost certain veto.[84]

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[81]119 Cong. Rec. 33548-69, 33858-73.

[82]See Eagleton's argument, ibid., pp. 33555-33556.

[83]Ibid., p. 33569.

[84]Ibid., p. 33873.

On October 20, President Nixon dismissed the Special Prosecutor investigating the Watergate affair. (Nixon's Attorney General resigned rather than carry out the dismissal, and when the task fell to the reluctant Deputy Attorney General he too was removed from office.)[85] And four days later President Nixon vetoed the War Powers Resolution.[86]

Nixon's veto message criticized the Resolution for restrictions on Presidential authority that "are both unconstitutional and dangerous to the best interests of our Nation." Specifically, he contended that the 60-day automatic termination provisions (section 5(b)) and the provision for earlier termination of hostilities by concurrent resolution (section 5(c)) are unconstitutional. He further argued that the bill would undermine American capacity to respond to international crisis, erode the confidence of allies and the respect of adversaries.[87]

He suggested that such a bill might have impeded responses in the Berlin crisis of 1961, the Cuban missile crisis of 1962, the Congo rescue of 1964, the Jordanian crisis of 1970, as well as recent actions in the middle east. The point here seems to be that troop deployments for diplomatic purposes would be affected.[88]

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[85] New York Times, 21 October 1973, p. 1.

[86] 119 Cong. Rec. 34990-34991.

[87] Ibid.

[88] Ibid.

Finally, the 60-day cut-off was attacked on a number of grounds. First, it was not clear just when the provision would be triggered. Second, it permits Congress to assert its authority through inaction: a "yes or no vote" would not be required. Third, Nixon argued that an automatic cut-off could rob an adversary of any incentive to negotiate or, encourage a rapid escalation by the United States in order to successfully end the operation.[89]

House Foreign Affairs Committee Chairman Morgan (D-Pa.) and subcommittee chairman Zablocki prepared a reply to the veto message, defending House Joint Resolution 542.[90] In effect, the reply simply denied or attempted to refute each of the points made by the White House. That Zablocki was successful cannot be attributed to sheer force of argument alone.

Congress and especially the Democrats in Congress were restive. They had been unable to override any of the eight Nixon vetoes that year. And now with all American troops home from Indochina and scandal tainting the administration, the legislature saw a chance to strike.[91]

In a dramatic November 7th session, following intense lobbying by both sides,[92] the House voted 284 to 135 to ap-

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[89] Ibid.

[90] 119 Cong. Rec. 33868-33869 (1973).

[91] CQ Almanac 1973, pp. 905-906.

[92] Ibid.

prove the act over the President's veto.[93] Four hours later the Senate, as expected, completed the override, 75 to 18, and the War Powers Resolution became Public Law 93-148.[94]

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[93] 119 Cong. Rec. 36221-36222.

[94] Ibid., p. 36198; CQ Almanac 1973, pp. 905-906.

Public Law 93-148

93rd Congress, H. J. Res. 542

November 7, 1973

JOINT RESOLUTION

Concerning the war powers of Congress and the President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United

States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in number which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to commiting the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the

status of such hostilities or situation, as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

Sec. 5(a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate for appropriate Action. If, when the report is transmitted, the Congress haa adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (of if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4 (a)(1), which ever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report is submitted (or required to be submitted), un-

less the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR
JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee

shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period

specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named

in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report has been filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term

"introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in the joint resolution--

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resoltuion or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the

date of its enactment.

III. Analysis of the War Powers Resolution

We now turn to a detailed analysis of the meaning and intent of the War Powers Resolution. Section 2, designated the "Purpose and Policy" section, indicates in subsection (a) that the joint resolution is intended "to fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to" use-of-force decisions.

Subsection (b) of that same section asserts as constitutional warrant for the Resolution, Article I, section 8, of the Constitution, especially the "necessary and proper" clause. In Article I, section 8, Congress is given the power to "declare war" (clause 11), "make rules for the government and regulation of the land and naval forces (clause 14)," and make "all laws which shall be necessary and proper for carrying into execution" not only these and other legislative powers, but also

> all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.[95]

The theory here is that the President, being an "officer" of the United States, may be subjected to a legislative procedure in the exercise of his powers. More specifically, the President's powers as Commander-in-Chief and chief

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[95]U.S. Const., Art. I, sec. 8, cl. 18.

executive may be clarified by Congress and implemented in accordance with acts of Congress. A major legal issue surrounding war powers legislation is whether such an act merely clarifies and provides implementation procedures for Presidential powers, or whether it in fact alters and trenches upon them.[96]

Subsection (c) of Section 2 is one of the most controversial provisions in the Resolution. It was the product of compromise between the elaborate codification of Presidential powers in the Senate bill and the absence of any codification in the House version.[97] In the Senate measure the President's authority to commit forces to hostilities was defined and circumscribed as a matter of law. The effect of Section 2(c) is not nearly so clear.

It states that the constitutional powers of the Commander-in-Chief to make use-of-force decisions

> are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions.

However, its location in the "Purpose and Policy" portion of the Act suggests that it might not have the binding force that the codification in the Senate bill would have had.[98] On the other hand, a Purpose and Policy section

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[96]See, e.g., House Hearings 1973, p. 130, Senate Hearings 1973, p. 19.

[97]Sen. Fulbright so contended at 119 Cong. Rec. 33548.

[98]See ibid., p. 33555 (remarks of Sen. Eagleton).

is not a Preamble, and Section 2(c) does follow the "Resolved by the Congress" clause.[99]

Secondly, unlike the Senate bill, this delineation of Presidential power no longer serves as the triggering mechanism for the rest of the Act. The Conference Report makes this quite clear.

> Subsequent sections of the joint resolution are not dependent upon the language of the subsection, as was the case with a similar provision of the Senate bill (section 3).[100]

Thirdly, there is no "enforcing language."[101] Instead of directing the President to exercise his powers in a certain manner, the clause merely states that they are so exercised, a peculiar use of tense.[102]

Finally, there seem to have been some serious omissions in this catalogue of Presidential powers. The Senate bill (S. 440) said that the President had "recognized powers" to respond not just to attacks upon the United States, but also to (1) the "imminent threat" of attack on the United States, (2) the imminent threat of attack on the United States Armed Forces, and (3) threats to United States citizens and nationals abroad. None of these are included among 2(c)s

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[99]William B. Spong, Jr., "The War Powers Resolution Revisited: Historic Accomplishment or Surrender?," William and Mary Law Review 16 (1975):837, 840.

[100]H. Rept. 93-547, p. 8.

[101]Spong, p. 838.

[102]Gerhard Casper, "Constitutional Restraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model," University of Chicago Law Review 43 (Srping 1976):484.

enumeration of the President's constitutional powers. Section 2(c) may thus be inconsistent with Section 8(d) which states that

> Nothing in this joint resolution . . . is intended to alter the constitutional authority . . . of the President . . .

Senator Eagleton may not have been going too far when he declared the provision "no more binding than a 'whereas' clause in a Kiwanis Club resolution."[103] Senator Javits who, as prime sponsor in the Senate spoke more authoritatively regarding the legislative intent, characterized Section 2(c) as "by no means valueless or inoperative."[104] It is, he went on, "a declaration of the meaning (of the) Constitution . . .,"[105] or, we might add, Congress' understanding of that meaning.

In short, Section 2(c) is advisory,[106] and Presidents may or may not heed its advice. In fact, President Ford proceeded to ignore 2(c) in the spring, 1975, rescues of American and Indochinese nationals from Southeast Asia.[107]

By contrast, Section 3 imposes non-discretionary obligations upon the President.[108] It directs that the President

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[103] 119 Cong. Rec. 33555 (1973).

[104] Ibid., p. 33557.

[105] Ibid., p. 33558.

[106] Spong, p. 840.

[107] Compliance Hearings, pp. 10-11.

[108] 119 Cong. Rec. 33550 (1973).

"in every possible instance shall consult with Congress before introducting" forces into hostilities or situations indicating imminent involvement. (My emphasis). The phrase "in every possible instance" had been carried over from the House bill unmodified and so we may turn to the report accompanying that bill for interpretation.

The use of the word "every" was intended to make prior consultation "inclusive," i.e., applicable even to emergency circumstances where there is no time for formal Congressional authorization.[109] However, the consultation requirement is modified by the use of the word "possible," by which Congress recognizes

> That a situation may be so dire, e.g.{,} hostile missile attack under way, and require such instantaneous action that no prior consultation will be possible.[110]

Clearly some ambiguity or uncertainty is evident here. The difference between an emergency requiring prior consultation and an emergency so dire that none is possible is a matter of judgment. President Ford complained that in the international crises of his Presidency it was "literally impossible" to meaningfully consult with Congress.[111]

It is clear from Section 3 that not all troop deployments require prior consultation: only commitments to hostil-

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[109] H. Rept. 93-287, p. 6.

[110] Ibid.

[111] New York Times, 12 April 1977, p. 14.

ities or imminent hostilities are covered. Although Presidential reports are required for foreign deployments of combat troops (section 4(a)(2) and 4(a)(3)), no prior consultation is mandated in these instances unless hostilities are ongoing or imminent.[112]

"Hostilities" is defined broadly to include both "actual fighting" and "a state of confrontation" with a "clear and present danger of armed conflict."[113] While this presents some problems, the phrase "imminent hostilities" is even more troublesome. This is defined as a situation with a "clear potential" for either fighting or a state of confrontation.[114]

Consider, however, the difficulties that arise when we try to apply this standard to a real-life event. When President Kennedy sent 20,000 military advisers to Vietnam, was this a commitment to hostilities or imminent hostilities?[115] If so, consultation would have been required had the War Powers Resolution been in force.

There is also some ambiguity surrounding the parties to consultation. The Conference Committee substituted consultation with Congress for consultation with the leadership

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[112] Compliance Hearings, p. 3.

[113] H. Rept. 93-287, p. 7.

[114] Ibid.

[115] The Congressmen favoring war powers legislation could not agree on this question. See House Hearings 1973, pp. 16-17, 73-74.

and appropriate committees as designated in the House bill.[116] This change suggests that the President and Congress were intended to have greater flexibility in selecting members of Congress to consult with the executive branch. Section 3 does not require a minimum number of legislative consultants, nor does it stipulate that certain Congressional officers, or committees, or committee chairmen participate, nor that representatives of the opposing political party be in on discussions.

Furthermore, Section 3 directs the President to consult, and the report accompanying the House bill says that "for consultation to be meaningful, the President himself must participate."[117] However, following the Mayaguez incident of 1975, the State Department noted four separate sets of executive-legislative communications--only one of which apparently involved President Ford personally--and claimed that these constituted fulfillment of the consultation requirements of section 3.[118]

Another issue raised by Section 3 involved the quality of the executive-legislative communication; i.e., what constitutes consultation? The earlier House report is, once

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[116] H. Rept. 93-547, p. 8.

[117] H. Rept. 93-287, p. 7.

[118] Compliance Hearings, pp. 78-79. Several Congressmen disputed the claim that the requirements of Section 3 were fulfilled, but not on the basis of the absence of personal Presidential communication.

again, authoritative here. It declared that

> A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely beging informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated.[119]

Again the first tests of compliance (the southeast Asian evacuations and Mayaguez incident of 1975), some legislators contended that Congress was merely advised or informed, as opposed to having been consulted.[120]

More recently, former President Ford, citing time factors, security leak risks, and the President's ability to stay abreast of fast-breaking developments, declared that

> it is impossible to draw the Congress into the decision-making process in an effective way.[121]

This seems all but a confession that Congress did not consult as mandated by Section 3. Ford's point, of course, was that the Resolution should be re-examined with regard to loosening the consultation requirement.[122]

The last clause of Section 3 requires consultation after troops are committed to hostilities or imminent hostil-

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[119] H. Rept. 93-287, pp. 6-7.

[120] See Compliance Hearings, p. 82; Spong, pp. 855, note 182, 856, 856, note 187.

[121] New York Times, 12 April 1977, p. 14.

[122] Ibid.

ities. This consultation must take place "regularly" until American forces "are no longer engaged in hostilities or have been removed" from situations of imminent hostilities. The term "regularly" is left undefined, but Congress made clear its intention that "consultation take place during hostilities even when advance consultation is not possible."[123]

Finally, Senator Javits made this point for the record: consultation is not intended by Congress to serve as authorization for executive action; it "is not a substitute for specific statutory authorization."[124]

We turn then to Section 4, entitled "Reporting," and thus to the triggering mechanism for the report and termination procedure. As we have noted, this section, unlike the Senate bill (S.440), does not attempt to set out in advance the circumstances under which the President may commit forces to hostilities. Instead it makes reporting and the termination of hostilities mechanisms contingent upon certain kinds of troop commitments.

There are three types of circumstances, all occurring in the absence of a declaration of war, in which the introduction of United States Armed Forces serves as a triggering device. The first entails their introduction into hostil-

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[123]H. Rept. 93-547, p. 8.

[124]119 Cong. Rec. 33550 (1973).

ities or situations of imminent hostilities.[125]

This makes an interesting change in the House bill (Section 3(1)), which specified that the forces had to be committed to actual (not just potential) hostilities taking place outside United States territory exclusively.[126] This does not mean that the introduction of forces into hostilities or potential hostilities on United States soil without a declaration of war is prohibited. But it does mean that the reporting, and more significantly, the termination procedures are thereby triggered, and therefore the introduction of forces into hostilities on American soil in response to attacks on the United States are, for example, subject to the automatic 60-day termination rule specified in Section 5(b). Congress' legal authority to provide for termination of such conflicts is in doubt.

A more compelling problem perhaps is raised by the ambiguity surrounding the meaning of the terms "hostilities," or worse still, "imminent hostilities."[127] We might ask at this point, who or what agency decides when troops have been committed to hostilities or imminent hostilities? Is this a matter for Presidential or Congressional determination?

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[125]War Powers Resolution, Pub. L. 93-148, sec. 4(a)(1), 87 Stat. 555 (1973).

[126]For emphasis on the latter point see H. Rept. 93-287, p. 7.

[127]See note 110, supra, and accompanying text.

At bottom this is a political question, to be determined by the relative power of the two branches; for while the President may initially withhold a report, Congress may insist that the unreported activities cease nevertheless.[128]

In short, 4(a)(1) provides that whenever the armed forces are introduced into combat, or a state of confrontation presenting a clear and present danger of combat, or a situation of clear potential for either combat or confrontation, a report is required and the 60-day termination countdown goes into effect.[129]

Section 4(a)(2), the second of the three triggers involves the introduction of combat troops abroad, even without the existence of hostilities or imminent hostilities. Congress intended this trigger to be operative even if there were only "some risk, however small, of the forces being involved in hostilities."[130]

Note that the troops would have to be "equipped for combat," and introduced into the "territory, airspace or waters of a foreign nation." So for example, war ship deployments to international waters would not be included; nor would deployments to foreign shores of military advisers who

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[128]This possibility is contemplated, at least by implication, by section 5(b) of the Resolution, which provides for automatic termination sixty days after a report is submitted "or is required to be submitted."

[129]See H. Rept. 93-287, p. 7.

[130]Ibid., pp. 7-8.

are not equipped for combat.

Also excluded are combat deployments related solely to "supply, replacement, repair, or training" of United States forces. The legislative intent here was to waive the reporting requirement in cases of "routine port supply calls, emergency aid measures, normal training exercises, and other noncombat military activities."[131] The meaning of the phrase "emergency aid measures" is not clear.

The report accompanying the House bill, which was virtually identical with the final act respecting this provision, clarifies the Congress' intentions. It read as follows.

> A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the United States presence felt. Thus, for example, the dispatch of Marines to Thailand in 1962 and the quarantine of Cuba in the same year would have required Presidential reports.[132]

The requirement that such activities be formally reported to Congress is non-controversial and it should be noted that such reported activities are not subject to the automatic 60-day termination rule.

Section 4(a)(3) describes the third of the triggering events. It calls for a report whenever forces are introduced in numbers which "substantially enlarge" a United States combat troop commitment abroad. The key word here

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[131] Ibid., p. 8.

[132] Ibid.

is "substantially," and once again the House report is instructive.

> While the word 'substantially' designates a flexible criterion, it is possible to arrive at a common sense understanding of the numbers involved. A 100-percent increase in numbers of Marine guards at an embassy--say from 5 to 10--clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U. S. troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, {sic?} President Kennedy would have been required to report to Congress in 1962 when he raised the number of U. S. military advisers in Vietnam from 700 to 16,000.[133]

Thus, substantiality involves consideration of both the size of the original combat force commitments as well as the size of the proportion of the increment. While this clarifies the term "substantially," it still leaves a great deal uncertain. There is no strict numerical standard for determining when a substantial enlargement has been made.

We have described each of the three triggering events in some detail. If any one of them were to occur, section 4(a) stipulates that the President submit a written report within 48 hours to the Speaker of the House and President pro tempore of the Senate. This report is mandatory, not optional, and is required "within 48 hours of the causal event."[134]

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[133] Ibid.

[134] 119 Cong. Rec. 33550 (1973) (remarks of Sen. Javits).

In 1975, President Ford submitted four reports pursuant to 4(a) respecting the southeast Asian evacuations and the Mayaguez incident.[135] These were the first reports ever submitted under the Resolution. Section 4(a) requires that the reports set forth the circumstances necessitating the introduction of forces, the constitutional and legislative authority for the action, and the estimated scope and duration of the hostilities or involvement.

Section 4(b) provides that the President shall provide such other information as the Congress may request,i.e., over and above what was supplied in the report.[136] This creates another area of potential legislative-executive conflict, especially if a President were to refuse information requested on grounds of national security.[137]

Section 4(c) requires additional Presidential reports subsequent to any of the troop introductions described in 4(a). These reports on the status as well as the scope and duration of the military operations are required "periodically," but at a minimum "once every six months," for as

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135 U.S., Congress, House, Committee on Internation Relations, The War Powers Resolution: Relevant Documents, Correspondence, Reports, January 1976 Edition, (Washington: Government Printing Office, 1976), pp. 40-46. {Hereinafter, War Powers Documents}.

136 119 Cong. Rec. 33550 (1973) (remarks of Sen. Javits).

137 For judicial views on executive attempts to maintain secrecy, see, New York Times v. United States, 403 U.S. 713 (1971), and United States v. Nixon, 418.U.S. 683 (1974).

long as United States forces are involved in hostilities or situations described in 4(a).[138]

Section 5(a) requires that reports submitted pursuant to 4(a)(1) (introduction into hostilities or potential hostilities) be transmitted to the Speaker of the House and the President pro tempore of the Senate "on the same calendar day," thereupon to be referred to the respective foreign relations committees. If Congress is not in session when the report is submitted, 5(a) provides that the Speaker and President pro tempore "jointly request" the President to convene Congress should they "deem it advisable," or should 30 percent or more of the members of the respective chambers so petition.[139]

Section 5(b), the automatic 60-day termination clause, is one of the most controversial provisions of the law. Thereunder, the President is required to terminate any use of the armed forces introduced pursuant to Section 4(a)(1) sixty calendar days after the initial report regarding these operations was submitted or required. A number of points require emphasis. It is clear that the termination rule only applies to forces introduced into hostilities or imminent hostilities; all other troop deployments, even those requiring reports pursuant to Sections 4(a)(2) and 4(a)(3)

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[138] 87 Stat. 556.

[139] Ibid. See also H. Rept. 93-287, p. 9.

are not covered.[140]

This can create some confusion, because if the President does not report or does not specify under which subsection of 4(a) he is reporting it will be left to Congress to make clear that the "60-day clock" is running.[141]

However, termination was intended to take place whether or not a report was submitted, the 60 days to be reckoned starting 48 hours after the introduction of forces into hostilities or imminent hostilities. Thus a failure to report, or a late submission would not extend the 60-day limit.[142] (Actually, if we include the 48-hour period set aside for Presidential reporting, the termination period runs 62 days from the start of hostilities.)

It is also clear that 4(a)(1) commitments are automatically terminated without any further Congressional action; in fact, operations are terminated even if Congess is not in session.[143]

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[140] 119 Cong. Rec. 33550 (1973) (remarks of Sen. Javits); H. Rept. 93-547, p. 9.

[141] President Ford's Report of April 30, 1975, was nonspecific, but the operation ended long before the two-month deadline. War Powers Documents, p. 43. Note Javits' remarks at 119 Cong. Rec. 33551 (1973). A similar point was raised by Gerald L. Jenkins, "The War Powers Resolution: Statutory Limitation on the Commander-In-Chief," Harvard Journal on Legislation 11 (February 1974):196.

[142] 119 Cong. Rec. 33551 (1973) (remarks of Sen. Javits).

[143] Ibid., p. 33859 (remarks of Mr. Zablocki).

Some object to the 60-day cut-off as an implied authorization to the President to conduct "war" for two months.[144] Others see the rule as encouraging escalation by Presidents (to beat the deadline) or negotiating balkiness by adversaries (to take advantage of an assured United States retreat.)[145] Still others criticize the derogation from Presidential power created by mandating a deadline without requiring any additional legislative action.[146] There is also the constitutional question raised by claiming that Congress may compel withdrawal of American forces which the President committed, presumably on the basis of his constitutional authority.

The strength of these objections notwithstanding, the intention of Congress to automatically terminate section 4(a)(1) operations after two months is clear. More problematic is the standard for determining within 48 hours of a troop deployment whether or not it is a 4(a)(1) (hostilities or imminent hostilities) operation.

Section 5(b) also provides for extension or waiving the 60-day deadline by Congress. Waiver would occur if Congress has declared war, or enacted a "specific authorization"

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[144]Eagleton, pp. v-vi.

[145]119 Cong. Rec. 34991 (1973) (War Powers Resolution Veto Message of President Nixon).

[146]For example, Rep. Dennis (R-Ind.) at 119 Cong. Rec. 33861 (1973).

for this use of the armed forces, or is "physically unable to meet" because of an attack on the United States. Congress may also extend "by law" the sixty-day period.[147]

Finally, 5(b) provides that the 60-day period shall be extended for an additional 30 days upon written Presidential notification to Congress that "unavoidable military necessity respecting the safety of United States forces" requires their continued deployment. This continued use, however, only applies "in the course of bringing about a prompt removal of such forces."[148]

The tightly drawn criteria of 5(b) require that the 30-day extension apply only when safe extrication of United States forces on the 60th day (the automatic deadline) is impossible.[149] Furthermore, the extension cannot be justified by any policy objectives other than safeguarding the physical safety of the United States forces involved.[150] Nevertheless, the language clearly permits the President to gain an additional 30 days for the conduct of hostilities simply upon proper certification to Congress.

We turn then to Section 5(c), another lightning rod for criticism of the Resolution. The clause is brief. It

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[147] 87 Stat. 556.

[148] Ibid.

[149] 119 Cong. Rec. 33550 (1973) (remarks of Sen. Javits).

[150] Ibid.

states that Congress may compel the President to remove United States forces engaged in hostilities abroad by passing a concurrent resolution. First, it should be noted that it only applies to forces outside the United States proper, or its territories and possessions.[151]

Second, these forces must actually be "engaged in hostilities," presumably this would not include forces introduced into situations where imminent involvement in hostilities is clearly indicated.[152]

Third, it takes a mere concurrent resolution to compel withdrawal. A concurrent resolution amounts to a legislative veto,[153] because it is enacted by a simple majority of both houses of Congress without Presidential review for signature or disapproval. The legal status of such measures is in doubt because Article I, section 7, clause 3, of the Constitution stipulates that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall

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[151] 87 Stat. 556.

[152] Ibid.

[153] Joseph P. Harris, Congressional Control of Administration (Washington, D.C.: The Brookings Institution, 1964), chap. 8.

be approved by him . . ." Nevertheless, there is a long, and since World War II, a growing list of enactments containing such provisions.[154]

The effect here is to permit a simple majority of both houses of Congress to "veto" troop commitments to hostilities by the President. However, hostilities cannot be "vetoed" during the 30-day extention for military necessity, nor if Congress extends the 60-day deadline by law.[155] In addition, as the statute specifies, hostilities authorized by declaration of war or specific statutory authorization are excluded from the 5(c) termination procedure.[156]

"In effect," the report accompanying an earlier House measure incorporating this same procedure said,

> the joint resolution 'endows' this concurrent resolution with the binding force of statute. Since the language applies to a situation where there is no congressional authorization for the President's action it thereby avoids the possibility of a Presidential veto--and resulting impasse--which would be possible on a bill or joint resolution.[157]

Sections 6 and 7, respectively, establish priority procedures for (1) bills or joint resolutions (provided for

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[154]H. Lee Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," California Law Review 63 (July 1975):983-1094.

[155]119 Cong. Rec. 33550 (1973) (remarks of Sen. Javits).

[156]87 Stat. 556-557.

[157]H. Rept. 93-287, p. 11.

in 5(b)) to waive or extend the automatic 60-day cut-off; and (2) concurrent resolutions (provided for in 5(c)) to terminate hostilities abroad.[158]

The procedures are self-explanatory; just a few points require emphasis. Sections 6 and 7 require all measures introduced pursuant to Section 5 to be referred to the respective foreign affairs/relations committees of the chamber of introduction. It is the responsibility of these committees to report out one bill for a vote, whereupon that measure becomes the pending business of the chamber.[159]

On the Senate side, debate time must be divided equally between proponents and opponents of the measure, thus eliminating the possibility of filibuster. Although there are specific deadlines for committee and house action, each chamber is free to modify these by a simple majority vote. Furthermore, even if all deadlines are met, a bill or joint resolution need not, under Section 6, clear both houses of Congress before 48 days of the 60-day cut-off period are consumed. (This does not include time for conference committee. If this is necessary the Resolution allots up to 59 days for the measure to clear.) A concurrent resolution could, under Section 7, take as much as 51 days to clear,

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[158]87 Stat. 557-558.

[159]Ibid., p. 557.

exclusive of conference work.[160]

These procedures do not guarantee that Congress will act speedily, or at all. While they do eliminate or shorten various time-consuming hurdles in the legislative process, a simple majority vote in one chamber can defer action on any proposal indefinitely.[161]

Section 8, the last major provision of the Resolution, is entitled "Interpretation of Joint Resolution." Subsection (a) denies that the President derives authority to introduce troops into hostilities or imminent hostilities from either statutes or treaties that do not specifically authorize such introductions. 8(a) relies upon language in the Senate bill (S. 440).[162]

The intent of 8(a)(1) is to deny that "area resolutions" such as the Tonkin Gulf Resolution of 1964 or defense appropriations (as alleged to the contrary in Orlando v. Laird) may serve to authorize the introduction of forces into hostilities. (At the time the War Powers Resolution was approved three area resolutions remained on the statute books: the "Formosa Resolution" (1955), the "Middle East Resolution" (1957), and the "Cuban Resolution" (1962). The Tonkin Reso-

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[160]Ibid., pp. 557-558.

[161]See Jenkins, pp. 197-198.

[162]119 Cong. Rec. 33550 (1973)(remarks of Sen. Javits).

lution had been repealed by Congress, effective January 12, 1971.)

8(a)(1) requires that such area resolutions or appropriations specifically authorize the introduction of forces into hostilities, and that they do so with reference to the War Powers Resolution. While the Senate bill (S.440) made this requirement prospective and upheld the validity of the three area resolutions in force,[163] the final measure applies retroactively and therefore probably modifies the resolutions to the extent that they cannot, unamended, authorize troop introductions into hostilities.[164]

8(a)(1) also aims to strike down the doctrine of Orlando v. Laird, viz., that appropriations to the military may provide authority for hostilities. To the extent that Orlando is grounded in the Constitution, it is unassailable by simple legislation. To the extent that it relies upon the Court's powers of statutory construction, Congress may have the final word on the subject.[165] As a result, the effect of this provision is yet unclear.

Subsection (a)(2) concerns the domestic effect of

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[163] S. Rept. 93-220, p. 24.

[164] The legislative intent is not clear on this. Cf., Jenkins, pp. 199-200.

[165] Orlando did not receive much wider application. The U. S. Supreme Court denied certiorari, 443 F. 2d 1039 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971).

all treaties "heretofore or hereafter ratified," and thus would be applicable, e.g., to the NATO pact.[166] The intent of 8(a)(2) is to require that all United States treaties be interpreted as non-self-executing with respect to the authorization of hostilities or imminent hostilities.[167]

Despite the United States agreement in article 5 of NATO to view an attack on any one signatory as an attack on all, the President would not be able to introduce troops into hostilities on the authority of the Treaty without implementing legislation. (It is possible that article 4 of NATO, the "constitutional processes" provision, requires implementing legislation anyhow.)

Under 8(a)(2) no treaty standing alone could be interpreted as warranting hostilities; Congress would have to enact "specific statutory authorization" within the meaning of the War Powers Resolution. There is a serious constitutional question as to whether Congress may prohibit the chief executor of treaties[168] and the Commander-in-Chief[169] from en-

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[166] 63 Stat. 2341, "North Atlantic Treaty," 4 April 1949.

[167] 119 Cong. Rec. 33550 (1973)(remarks of Sen. Javits).

[168] U.S. Const., art. II, sec. 1, cl. 1.

[169] Ibid., art. II, sec. 2, cl. 2.

forcing an international agreement by the use of force short of war.[170] (The War Powers Resolution speaks of "hostilities," a term considerably broader than "war.")

In order to assure allies that this Resolution does not affect United States treaty obligations, section 8(d)(1) expressly declares the following.

> Nothing in this joint resolution . . . is intended to alter . . . the provisions of existing treaties . . .[171]

However, insofar as implementing legislation was not intended by existing treaties, 8(d)(1) may be inconsistent with 8(a)(2).

Turning to section 8(b), we note Congress' intent to avoid disrupting the NATO command structure.[172] This provision is understood to apply to the "high-level military commands" of NATO, the North American Air Defense command (NORAD) and the United Nations command in Korea (UNC).[173] The language makes clear that nothing in the Resolution is intended to

> prevent members of the United States Armed Forces from participating in certain joint military exercises with alled or friendly organizations or

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[170] Cf., Louis Henkin, Foreign Affairs and the Constitution (Mineola, N.Y.: The Foundation Press, 1972), p. 407, note 100.

[171] H. Rept. 93-287, p. 12.

[172] 119 Cong. Rec. 33550 (1973)(remarks of Sen. Javits).

[173] H. Rept. 93-547, p. 10.

countries.[174]

Subsection (c) is designed to broaden the meaning of the phrase "introduction of United States armed forces" to include members of the armed forces serving as military advisers assigned to foreign forces.[175] This would not include non-armed forces personnel, such as CIA advisers,[176] and it only applies when the foreign forces are engaged in or face imminent hostilities.

Section 8(d)(1) uses the language of the House bill "to disclaim any intention of altering the constitutional grants of war powers to the legislative and executive branches."[177] This provision, while high-sounding, has very little significance. The other part of 8(d)(1), denying any intent to alter treaty provisions, has already been noted. (See above).

Section 8(d)(2) declares that nothing in the Resolution may be interpreted as granting the President any authority respecting the introduction of forces into hostilities that he did not already possess.

8(d)(2) seems clearly inconsistent with sections 4 (a)(1) and 5(b), which assume the introduction by the Presi-

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[174]Ibid.

[175]S. Rept. 93-220, p. 27.

[176]The Senate expressly rejected such a proposal. 119 Cong. Rec. 25092 (1973).

[177]H. Rept. 93-287, p. 12.

dent of forces into hostilities for up to 2 months without Congressional approval. Although Senator Javits, responding to Senator Eagleton's charge, denied it was so,[178] Sections 4(a)(1) and 5(b) do imply that the President has the authority to conduct hostilities for 60 days, unqualified by any standards for the exercise of that power. It is doubtful that before this Resolution the President could have claimed the unqualified authority to conduct hostilities for two months without legislative approval.

The last sections (9 and 10) consist of a standard "separability clause," declaring Congress' intent that the invalidation of one provision by a court not affect the remainder, and that the Resolution take effect upon day of enactment.[179]

This completes my analysis of the meaning of the War Powers Resolution. In the last section of this chapter I explore some Constitutional problems raised by the law.

IV. The War Powers Resolution and the Constitution

The War Powers Resolution relies upon Congress' Constitutional authority to declare war,[180] to make rules for

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[178]Eagleton's remarks are at 119 Cong. Rec. 33556 (1973). Javits' are at ibid., 33558.

[179]87 Stat. 559.

[180]U.S. Const. art. I, sec. 8, cl. 11.

the armed forces,[181] and make all laws necessary and proper to carry out the powers vested by the Constitution in the Congress and in the departments or officers of the United States.[182]

The President has, under the Constitution, the executive power,[183] the duty (and power) to faithfully execute the laws (including treaties)[184] and those powers associated with the office of Commander-in-Chief.[185]

The Resolution has three constitutionally controversial sections. Section 2(c) attempts to define the parameters of the emergency powers of the Commander in Chief. Section 5 establishes two procedures for legislative termination of hostilities begun by the President. And Section 8(a)(2) prohibits the President from using force to execute treaties without specific legislative action.

Section 2(c) relies upon the "necessary and proper" clause, especially the last portion, in order to define the powers of the Commander-in-Chief.[186] Without Congressional authorization or declaration of war, 2(c) recognizes Presi-

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[181]Ibid., art. I, sec. 8, cl. 14.

[182]Ibid., art. I, sec. 8, cl. 18.

[183]Ibid., art II, sec. 1, cl. 1.

[184]Ibid., art. II, sec. 1, cl. 1.

[185]Ibid., art. II, sec. 2, cl. 1.

[186]Without Congressional authorization or declaration of war, 2(c) recognizes Presidential authority to introduce troops into hostilities or imminent hostilities only in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

tial authority to introduce troops into hostilities or imminent hostilities only in " a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." While there is little doubt that Congress may define these powers in order to promote their exercise in accordance with law, the separation of powers principle forbids Congress from taking the opportunity to alter these powers to its own advantage.[187]

A simple test for 2(c) is to note whether or not its enumeration of Presidential powers is complete by contemporary constitutional standards. One measure of contemporary standards is the Senate's version of the war powers bill, viz., the measure delineating Presidential power.[188] The Senate measure, approved in an atmosphere hostile to Presidential power, lists at least three "recognized powers" of the President not to be found in 2(c).

They are the powers of the President to respond to (1) imminent threats to the nation, (2) imminent threats to its armed forces, and (3) imminent or actual threats to the lives of its citizens or nationals abroad. Not only were these included in the Senate bill, but judicial authority and long-standing practice would seem to have firmly estab-

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[187]See Myers v. United States, 272 U.S. 52 (1926). Cf. Bickel testimony at pp. 19-20, and Brower testimony at p. 56, Senate Hearings 1973.

[188]S. 440, last approved July 20, 1973. The House of Representatives rejected this approach because it felt Congress could not develop an enumeration both complete and not over-generous.

lished executive claims to them.[189] To the extent that 2(c) was intended to be a complete list of Presidential emergency power (and the use of the word "only" suggests this intent; see note 186 above), it is woefully under-inclusive and thus unconstitutional.

5(b) is subject to criticism respecting its constitutionality on the following grounds:

(1) It represents an implied grant of war-making authority for 62 days and therefore unduly delegates legislative power to the President.

(2) By providing for automatic termination of hostilities short of war it trenches upon Presidential authority.

Criticism number one evokes the following defense. First, there is no intent to grant any power to the President that he does not already have; this is explicit in section 8(d)(2). Second, Section 2(c) narrowly defines the parameters of the emergency powers of the Commander-in-Chief, and therefore there is no excessive delegation.

The trouble with this defense is that (a) although Congress may not have intended to amplify Presidential powers, the statute may in fact extend them, rendering 8(d)(2) mere surplusage; and (b) Congress intended that subsequent sec-

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[189] S. 440, sec. 2. See J. Terry Emerson, "The War Powers Resolution Tested: The President's Independent Defense Power," Notre Dame Lawyer 51 (December 1975):187-216.

tions of the Resolution operate independently of section 2(c), so that Section 5 is not limited by 2(c).[190]

The provision can be saved by reading the term "hostilities" to mean armed conflict short of "war," as understood by the Constitution. In the area of armed conflict short of war, the President can make a substantial claim to independent authority,[191] therefore Congress cannot be said to be giving away its powers wholesale, but rather imposing time limitations on the exercise of powers shared by both branches.[192]

The trouble with this line of reasoning, however, is that such a reading of the term "hostilities" throws us directly into the arms of the second criticism. That is, 5(b) must now be read to impose an automatic two-month deadline on all hostilities short of war: an area where Congress cannot claim exclusive authority. There might be occasions where the President would introduce troops into hostilities pursuant to his constitutional authority (say in defense of Guam, a United States territory) and in the absence of any legislative action his authority would be terminated by law

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[190] H. Rept. 93-547, p. 8.

[191] See John Norton Moore testimony, Senate Hearings 1971, p. 479

[192] Hostilities short of war may be considered a "twilight zone" of the Constitution under Justice Jackson's analysis, where both Congress and the President can claim some authority. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (concurring opinion).

on the 62nd day,[193]

But could the provision not be saved by another line of defense, perhaps simply on the grounds that Congress may regulate all hostilities because the power to declare war includes the power to regulate those events which might precipitate war?[194]

This defense must fail, too, however. It does not take into account what the legislature recognizes in Section 2(c): Congress does not have authority to regulate all hostilities. Section 2(c)(which is itself deficient) concedes Presidential authority over hostilities issuing out of certain national emergencies. Can it be claimed that Congress may mandate an end to such hostilities upon the 62nd day of conflict?

If the above reasoning is correct, 5(b) suffers serious constitutional infirmities. We next examine Section 5(c) which provides for termination of hostilities by concurrent resolution.

5(c) would appear to exhibit the same defect as 5(b), namely, that it presupposes Congressional power over all hostilities without regard to the President's independent power.

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[193]Actually, the conflict could be extended thirty additional days if the President were to certify unavoidable military necessity.

[194]As "Helvidius," Madison relied upon the same rationale to assert Congressional predominance in foreign affairs generally. James Madison, Letters and Other Writings of James Madison, 4 vols. (Philadelphia: J. B. Lippincott and Co., 1865), 1:607-54.

In addition, it is burdened by its reliance upon the concurrent resolution, or legislative veto, which has constitutional problems of its own.

However, there is a difference between 5(b) and 5(c) that is, I believe, crucial: 5(b) is automatic and 5(c) is not. 5(c) may be invoked selectively; it may be applied to unlawful assertions of Presidential authority alone. That the framers of the Resolution intended it to be so applied is made clear by the following colloquy on the House floor.

> MR. ECKHARDT. If Congress may withdraw authority or may negative the Presidential authority by virtue of concurrent resolution, such action implies that the President did not have authority in the beginning and Congress is merely asserting its right to negative Presidential authority in that area.
>
> If that is the case, one must infer, it seems to me, that the President is acting within an area preempted for Congress by the Constitution except for the passage of this resolution.
>
> Now, as I understand the gentleman to answer me, he does not intend to give the President additional authority, but the gentleman concedes that the President may act beyond his authority, and we only include this section as a means by which Congress can reaffirm the fact that the Presidential action was wrongful in the first place.
>
> MR. ZABLOCKI. Mr. Speaker, that is exactly right.[195]

Because it applies selectively (unlike 5(b)), section 5(c) is capable of distinguishing lawful and unlawful executive actions. Thus it avoids the pitfalls of the section that precedes it.

However, a different problem is raised by the use of the legislative veto. Article I, section 7, clause 3 requires "Every Order, Resolution, or Vote to which the Concur-

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[195] 119 Cong. Rec. 33860 (1973), emph. added.

currence" of both chambers is necessary, except adjournment, to get either Presidential approval, or, failing that, two-thirds of both houses. A concurrent resolution, such as is called for in 5(c), is intended to take effect without either Presidential approval or two-thirds vote.[196]

Despite the seeming contradition with Article I, section 7, clause 3, the legislative veto has been used with increasing frequency since World War II, most notably in legislation authorizing the President to reorganize the Executive branch.[197] The standard justification for it had been that Congress was singly reserving to itself the power to approve or disapprove the exercise of power delegated to the President in the first place.[198]

However, as Congressman Eckhardt's (D-Tex.) comments (above) and section 8(d)(1) of the act make clear, the War Powers Resolution "does not intend to give the President additional authority."[199] If we accept this assertion as accurate then we cannot justify section 5(c) as simply a device to register (dis)approval of the exercise of delegated powers.

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[196]H. Rept. 93-287, p. 11.

[197]See Harris, chap. 8; Watson, passim; Robert W. Ginnane, "The Control of Federal Administrationby Congressional Resolutions and Committees," Harvard Law Review 66 (February 1953):569-611.

[198]See, e.g., Congressional Research Service, Memorandum, "Constitutionality of the Legislative Veto Amendment to the Military Sales and Assistance Act," 120 Cong. Rec. 17950 (1973).

[199]See note 193 and accompanying text, supra.

The concurrent resolution in 5(c) is not attached to a grant of power.[200] Use of the concurrent resolution had been defended on other grounds. For example, it is contended that to compel Congress to pass a bill or joint resolution--both of which may be vetoed by the President--is to require a two-thirds vote to override unilateral executive commitments to hostilities.[201] This assumes a bill or joint resolution directing withdrawal is vetoed, thus requiring a two-thirds vote to be enacted into law.

Watson develops this point, noting that while delegated power may be withdrawn by concurrent resolution, assertions of inherent power would go virtually unchecked if control by statute were required; one-third of either house could block any limitation of the President.

Relying upon Jackson's opinion in Youngstown v. Sawyer,[203] Watson contends that where the President asserts inherent authority to act in an area

> where Congress would possess power to control executive actions by statute, Youngstown, as well as the analysis of the Comment, leads to the conclusion that a (concurrent resolution under an act such as the War Powers Resolution is a valid exer-

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[200]See Representative Dupont's (R-Del.) remarks at 119 Cong. Rec. 33862 (1973). But see, contra., H. Rept. 93-287, p. 14.

[201]Representative Thomas E. Morgan and Representative Clement J. Zablocki, "Reply to the President's Veto Message on the War Powers Resolution," 119 Cong. Rec. 35868 (1973).

[202]Watson, p. 1085.

[203]343 U.S. 579, 635-37 (1952) (concurring opinion).

cise of congressional power.[204]

Watson reasons that enactment of a concurrent resolution under 5(c) would be analogous to Congress' refusal to act in a "twilight zone" area.[205] (Congress' refusal to approve a measure granting the President seizure power was considered relevant to a determination of the validity of President Truman's assertion of that power.)[206]

When combined with the Eckhardt qualification, viz., that Congress may only "veto" unlawful assertions of Presidential authority, the Watson rationale seems persuasive. It should be kept in mind, however, that the Supreme Court has not determined on the constitutionality of the legislative veto, although repeated practice and acceptance by both Congress and President would appear to have established its legitimacy.[207]

To briefly summarize the analysis so far, Section 5(c), the legislative veto clause, has a better claim on constitutional validity than either the 60-day automatic termination provision, 5(b), or the rather impoverished delimitation of

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[204]Watson, p. 1085.

[205]Ibid., p. 1086.

[206]Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[207]The Supreme Court touched the issue only obliquely in Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1940). For a compilation of statutes making use of a legislative veto see Watson, pp. 1089-94.

Presidential powers in Section 2(c).

Finally, we examine section 8(a)(2) which interprets all treaties heretofore or hereafter ratified as non-self-executing insofar as the introduction of United States forces is concerned.[208] This provision is reminiscent of the proposed Bricker Amendments to the Constitution which would have required Congressional implementation before any treaty could become effective as internal law.[209] The War Powers Resolution also includes a denial of intent to alter the provisions of existing treaties (section 8(d)(1)).

The possibility that 8(a)(2) and 8(d)(1) may be inconsistent notwithstanding, the legal question is whether or not Congress may require the legislative implementation of all treaty provisions respecting hostilities. Normally, the President decides whether or not a treaty or provisions thereof are self-executing; this is based upon his executive power (Article II, section 1) and the powers needed to "take care" that the laws be faithfully executed (Article II, section 2).[210]

In addition, where troops are needed to enforce a treaty, the President may rely upon his powers as Commander-

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[208]See note 167, supra.

[209]Representative of the Bricker proposals was S.J. Res. 1, 83d Cong., 1st sess., 99 Cong. Rec. 6777 (1953).

[210]See Henkin, p. 158.

in-Chief (Article II, section 1). The Senate however, as part of its power to give "advice and consent" to treaties (Article II, section 2) has frequently required that treaties be considered non-self-executing.[211]

In the case of 8(a)(2), Congress is apparently asserting its authority under the declaration of war (Article I, section 8, clause 11) and the "necessary and proper" clauses (Article I, section 8, clause 18); undoubtedly the grounds are that the legislature may regulate hostilities resulting from the enforcement of treaties because they may lead to war.[212] If Congress were simply saying that the President may not rely upon a treaty provision alone as justification for initiating a "war," as the term is used in Article I, section 8, clause 11 of the Constitution, they would be on very solid ground.[213]

However, once again the reference is to "hostilities" (and even situations of potential hostilities), a term much

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[211]Ibid., p. 159.

[212]See note 192 and accompanying text, supra.

[213]In Reid v. Covert, 354 U.S. 1, 16 (1957), the Supreme Court said that ". . . no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." At one point the Johnson administration tried to justify the Vietnam War on the basis of the SEATO pact and the Gulf of Tonkin Resolution, to the dismay of some Congressmen. See U.S., Department of State, "The Legality of United States Participation in the Defense of Viet-Nam," in Richard A. Falk, The Vietnam War and International Law, 4 vols. (Princeton, N.J.: Princeton University Press, 1968-76), 1 (1968):597-601.

broader than "war," and as we pointed out in regard to section 5(b) of the Resolution, Congressional authority does not extend to all instances of hostilities short of war.[214] In sum, 8(a)(2) suffers the same defects of overbreadth as 5(b): it was intended to assert Congressional control over areas reserved to the Executive branch.[215]

In conclusion, of the three elements of the War Powers Resolution whose constitutionality we considered, Sections 5(b), 5(c), and 8(a)(2), only Section 5(c) could, under this analysis, withstand legal challenge.

V. Conclusion

We have explored the background, history, meaning, and constitutionality of the War Powers Resolution. In its only practical test to date, the evacuations of Southeast Asia and the Mayaguez incident of Spring 1975, one of the principal drafters of the measure gave the executive branch "mixed marks" on compliance.[216] And only recently former President Ford suggested that some of the provisions were in need of re-examination because they are too restrictive in

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[214] See notes 189-92 and accompanying text, supra.

[215] Cf. Henkin, p. 407, note 100, regarding a similar provision in S. 2956: "Insofar as this bill, if it becomes law, applies to hostilities 'short of war' the President might feel free to disregard it."

[216] Representative Zablocki's introduction to the Compliance Hearings, p. vi.

a crisis.[217]

Although the measure is an attempt to prevent another Vietnam-type war, one commentator speculates that had it been in force at the time it would not have prevented the Indochina conflict, but it would have sharpened domestic conflict over it.[218]

Whatever the merits of this retrospective application, the future effect of the Resolution remains unclear. As long as there is mistrust of the Presidency and presidentially inspired foreign policy the Resolution could be used to make the executive more accountable to the legislature. However, there are enough ambiguities[219] and legally dubious provisions in the measure to encourage, given the proper public mood and political balance of power, lax enforcement. The true test of the War Powers Resolution will come when memories of the divisive Vietnam "era" have begun to fade.

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[217]Quoted in New York Times, 12 April 1977, p. 14.

[218]Graham T. Allison, "Making War: The President and Congress," in Thomas E. Cronin and Rexford G. Tugwell, The Presidency Reappraised, 2d ed. (New York: Praeger Publishers, Inc., 1977), pp. 228, 241-44.

[219]E.g., the start of "hostilities," or the meaning of "imminent hostilities."

CHAPTER X

THE JUDICIARY AND PRESIDENTIAL WAR-MAKING POWER

We have already discussed a number of court cases dealing with Presidential war power, cases which arose out of the "undeclared wars" we have analyzed. Here we wish to analyze the pertinent cases not yet reviewed, and draw some generalizations respecting the role of the judiciary.

Our question remains: What is the scope of the President's power to initiate hostilities in the absence of a Congressional declaration of war? One line of reasoning has been predicated upon the distinction between defensive war, that is, war thrust upon the country, and war initiated by the United States. This theory of defensive war ultimately became the basis of the Supreme Court's ruling in the famous Prize Cases.[1]

A United States circuit court relied upon it in United States v. Smith as early as 1806. Smith was accused of violating a Federal neutrality act by making preparations to launch an expedition into territory held by Spain, a country with which the United States was at peace. In his defense, Smith contended that whatever he did was done with the "knowledge and approbation" of the President and some of

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[1]Prize Cases, 2 Bl. (U.S.) 635 (1863).

his cabinet officers, and he urged the court to subpoena Secretary of State James Madison and other executive officers so they could so testify.[2]

The court refused for the reasons which follow.

> The president of the United States cannot control the {neutrality} statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids . . . . If, then, the president knew and approved of the military expedition set forth in the indictment against a prince with whom we are at peace, it would not justify the defendant in a court of law, nor discharge him from the binding force of the act of congress; because the president does not possess a dispensing power.[3]

In short, the testimony requested would be irrelevant because the President could not exempt anyone from the obligation imposed by the statute to observe neutrality. Could the President disregard the statute himself and lead the country into war?

> Does he possess the power of making war? That power is exclusively vested in Congress . . . by the eighth section of the 1st article of the constitution . . .[4]

The court admits that Congress authorized the President to call forth the militia to repel invasions and suppress insurrections by its act of February 28, 1795. But it goes on to distinguish repelling invasion from initiating a

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[2]United States v. Smith, 27 F. Cas. 1192 (No. 16, 342) (C.C.D.N.Y. 1806).

[3]Ibid., p. 1230.

[4]Ibid.

war.

> {T}he right to repel invasions arises from self-preservation and defence, which is a primary law of nature, and constitutes part of the law of nations. It therefore becomes the duty of a people, and particularly of the executive magistrate, who is at their head, and commander-in-chief of the forces by sea and land, to repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another . . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war.[5]

In short, the President may wage defensive war, but only Congress may authorize the initiation of hostilities on the part of the United States. Were this not dicta, and were it not a circuit court as opposed to the United States Supreme Court speaking, United States v. Smith would no doubt be an oft-cited landmark.

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As it turns out, the act of 1795 came under direct Supreme Court scrutiny in the case of Martin v. Mott. That act provided

> that whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the president of the United States to call forth such number of the militia . . . as he may judge necessary to repel such invasion . . .[6]

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[5]Ibid.

[6]1 Stat. 424 (1795), quoted in Martin v. Mott, 12 Wheat. (U.S.) 19, 29 (1827).

The law had been passed pursuant to Article I, section 8, clause 15 of the Constitution which empowers Congress

> {t}o provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

We wish to call attention to two aspects of this legislation. First, one of the earliest of the Congresses interpreted the phrase "and repel invasions" in Article I, section 8, clause 15, as including the "imminent danger of invasion," thus lending its authority to a somewhat looser understanding of the idea of defensive war. For under this understanding a war would be defensive if the other side were about to attack but had not yet done so.

This suggests that the doctrine of defensive war adopted by the Supreme Court in the Prize Cases may legitimately be given a more expansive reading.

Secondly, the phrase, "as he may judge necessary," suggests, again with some authority, that the President must be accorded a measure of discretion, at least in the determination of the number of militia necessary, but also, as will be apparent from Martin, in the determination of whether or not there is sufficient danger to compel the call-up of any militia at all.

This discretionary element has, as will be seen, its analogue in the Prize Cases ruling that the courts must be bound by a Presidential finding of belligerence.

Martin v. Mott arose when, during the War of 1812, the governor of New York called forth the state militia upon the requisition of President Madison. One Mott, who was liable for service, failed to show, and was tried and convicted by a court-martial several years later.

Justice Story wrote for the United States Supreme Court upholding Mott's conviction. Story had no doubt that the law was valid, or that Congress could provide for imminent danger as well as actual invasion. "In our opinion," said Story in behalf of a unanimous tribunal,

> there is no ground for a doubt on this point . . . for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil.[7]

But Mott was not challenging the act of Congress, he was questioning the authority of the President and the chief executive of New York. In respect to the President, Story responded as follows.

> The power thus confided by congress to the president, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service, is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confided to cases of actual invasion, or of imminent danger of invasion. If it

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[7]12 Wheat. (U.S.) 19, 29 (1827).

> be a limited power, the question arises, by whom is the exigency to be judged of and decided?[8]

Story's answer was unambiguous, and did not rest upon statutory construction alone.

> Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered an open question, upon which every officer to whom the orders of the president are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the president? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress.[9]

To be sure, Martin v. Mott concentrates in large measure upon the exercise of Presidential power pursuant to an express delegation of power from the legislature. And Presidential power to punish persons under martial law was subsequently trimmed in the Milligan and Endo cases. Nevertheless, the case provides authority for a loose construction of the power to repel invasions as including the power to provide for imminent danger of invasion. And it also suggests that the determination of whether or not the country is in such jeopardy is a matter of Presidential discretion, not subject to judicial review.[10]

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[8]Ibid.

[9]Ibid., pp. 29-30, emphasis added.

[10]Ex parte Milligan, 4 Wall. (U.S.) 2 (1866); Ex parte Endo, 323 U.S. 283 (1944).

Now we turn to the renowned Prize Cases, which arose when, after the firing upon Fort Sumter, President Lincoln proclaimed a blockade of the Confederacy in April, 1861. At this time Congress was not in session; subsequently, the legislature expressly validated all of Lincoln's acts. As a result of the blockade, and before Congress acted, four ships, two of them foreign-owned, were captured by United States naval vessels off the shores of various southern states.[11]

Under the internation law of the period, neutral third parties were bound to respect a blockade, which was an act of war. And so the foreign ship owners argued that without a Congressional declaration the United States was not at war in the legal sense, and therefore could not have established a blockade which foreign vessels were legally obligated to observe.[12]

A scant 5-4 majority rejected this line of reasoning. Speaking through Justice Grier, they contended that declaration or no, the United States was at war.

> This greatest of civil wars . . . sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without

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[11]Prize Cases, 2 Bl. (U.S.) 635, 670 (1863); Clinton Rossiter, The Supreme Court and the Commander in Chief (Ithaca, N.Y.: Cornell University Press, 1951; reprint ed., New York: Da Capo Press, 1970), p. 69.

[12]2 Bl. (U.S.) 635, 649 (1863); Rossiter, p. 73.

> waiting for Congress to baptize it with a name; and no name given it by him or them could change the fact.[13]

And while admitting that, "{b}y the Constitution, Congress alone has the power to declare a national or foreign war," and that the President "has no power to initiate or declare a war either against a foreign nation or a domestic State," Grier went on to uphold Lincoln's action. To do so he relied upon the theory of defensive war, and expanded Presidential power thereunder.[14]

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."[15]

But more, not only may the President unilaterally recognize that the United States is at war, but his decision, once tendered, is binding upon the courts.

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political depart-

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[13] 2 Bl. (U.S.) 635, 668-69 (1863).

[14] Ibid., p. 668.

[15] Ibid.

> ment of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of the blockade is itself official and conclusive evidence to the Court that a state of war existed . . .[16]

This, of course, sounds very much like the "political questions" doctrine espoused in Luther v. Borden, where the Court refused to review the President's decision to support the Charter government of Rhode Island as against Thomas Dorr's rebel government.[17]

The dissenters, led by Justice Nelson, held that while war existed in "the material sense," it did not exist "in a legal sense" because it was not "recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress . . ." The minority insisted that the President

> does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress . . . and, consequently, that the President has no power to set on foot a blockade under the law of nations . . .[18]

The dissenting rationale is not without problems. First off, the distinction between war in the "material" and

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[16]Ibid., p. 670.

[17]Luther v. Borden, 7 How. (U.S.) 1 (1849).

[18]Prize Cases, 2 Bl. (U.S.) 635, 690, 698 (1863).

war in the "legal" sense is difficult to sustain upon analysis.[19] Secondly, it is hardly credible that the United States could have been denied belligerent status with its attendant rights in international law for want of a formal Congressional declaration of war. As a rule a nation's internal political arrangements are irrelevant to a determination of its international rights; and anyway the President is the sole agent of communication for the United States in its external relations.[20]

But it is the majority's argument, that the President is "bound to resist force by force . . . without waiting for any special legislative authority," that most interests us. The Court refers to two contingencies, the existence of either of which would justify the President in conducting a war. The contingencies are insurrection or civil war and "invasion of a foreign nation."[21]

Only the category of "invasion" involves foreign affairs, and it alone concerns us. Here is where difficulty enters. The Court intended, undoubtedly, to establish the legality of unilateral Presidential action in the face of a foreign attack. While actual invasion of United States

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[19]Fritz Grob, The Relativity of War and Peace (New Haven: Yale University Press, 1949), passim.

[20]Louis Henkin, Foreign Affairs and the Constitution (Mineola, N.Y.: The Foundation Press, Inc., 1972), p. 188.

[21]Prize Cases, 2 Bl. (U.S.) 635, 668 (1863).

territory is clearly included, may the President lawfully respond to other threats as well?

Authorities are in disagreement on this. In his early work, Corwin thought he could so respond. Wright contended that "the fact of war" would have to be "so patent as to leave no doubt." Among contemporaries, aware of the possibility of rapid attack by missiles and long-range bombers, there still seems to be dispute. R. Berger appears to adhere to the invasion-of-United-States-soil requirement, while Henkin suggests that the President"probably . . . has authority . . . to anticipate by a preemptive strike an attack he believes imminent."[22]

Interestingly enough, the Supreme Court in the Prize Cases cited as precedent for Lincoln's blockade the two battles fought just prior to the Congressional recognition of the existence of a state of war between the United States and Mexico in 1846. But as our study revealed, these battles were fought upon disputed territory (although President Polk claimed it was "American soil") and were provoked by the American President. By offering the Mexican War--scarcely an instance of defense against invasion--as a precedent,

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[22]Edward S. Corwin, The President's Control of Foreign Relations (1917; reprint ed., New York: Johnson Reprint Co., 1970), pp. 141-142; Quincy Wright, The Control of American Foreign Relations (New York: The Macmillan Co., 1922), p. 289; Raoul Berger, Executive Privilege, A Constitutional Myth (New York: Bantam Books, Inc., 1975), p. 91 and note 107; Henkin, p. 52.

the Court bolsters the position of those who contend that the President may respond to threats short of actual invasion.[23]

This points up another problem, and that is the tendency of American presidents, like all national leaders, to justify on grounds of self-defense their resort to force against other states. Polk's claim at the start of the Mexican War is a perfect example. Should the Executive make such a claim, is it, under the authority of the Prize Cases, reviewable in court? Recall Justice Grier's contention that the Court would have to be governed by the President's determination that a state of war existed.[24]

Thus not only is a Presidentially authorized defensive war legal, but the President's judgment that such a war was necessary is not justiciable. The ineluctable conclusion is that the determination of whether or not there is a direct threat to the United States and what degree of force, if any, is necessary to meet that threat is a matter of Executive discretion.

This discretion would no doubt extend to the decision to launch a preemptive strike in order to abort an attack believed imminent. Would it also cover attacks, conventional or nuclear, upon another country, say, a party to a mutual defense treaty with the United States? Article 5 of

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[23]See my study on Mexican-American conflicts, chap. 5, supra.

[24]2 Bl. (U.S.) 635, 670 (1863).

NATO, for example, stipulates "that an armed attack against one or more" of the Parties "shall be considered an attack against them all."

If an attack upon western Europe is tantamount to an attack upon the United States, is the President empowered to respond to the former as he would to the latter by the authority of the Prize Cases? A brief answer (we consider the effect of treaties upon Presidential war-making power in detail at another point) is that insofar as such an attack is considered evidence of an imminent invasion of the United States, the President may use such force as is necessary to forestall the latter.

Which is to say that such treaties, while creating international obligations upon the United States, do not alter the internal "constitutional processes" of the signatories, in accordance with which they are all pledged to act.[25]

In summary, the doctrine of the Prize Cases, which rests upon the theory of defensive war, opens the door to broad claims for Presidential war-making power in four ways: first, as a result of inflated claims of attacks upon or threats to the nation; second, because a challenge to a Presidential claim of self-defense raises a non-justiciable pol-

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[25]63 Stat. 2341, "North Atlantic Treaty," 4 April 1949, art. 11.

itical question; third, because technological changes have made possible widespread destruction with such speed that a preemptive (first!) strike might be considered an act of self-defense; and fourth, because an attack upon another country may justifiably be considered evidence of an imminent threat to the United States.

While the concept of self-defense is quite broad and subject to abuse, it is not unlimited. The Prize Cases doctrine could not justify, for example, either the Korean or Vietnam wars, because neither the attack on the ROK nor the systematic subversion of the GVN was evidence of an imminent attack upon the United States (By Article IV, section 1, each of the parties to SEATO agreed that an attack in the treaty area "would endanger its own peace and safety." Contrast with NATO, Article V, where an attack on one party "shall be considered an attack against them all.")

The essence of the Prize Cases doctrine is that the President may recognize that the United States is at war, either as a result of an attack upon the United States proper or compelling evidence that such an attack is imminent.

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Not only may the President recognize war or the imminent threat of attack, we have seen in Durand v. Hollins, decided by the same Justice Nelson who led the dissenters in the Prize Cases, that he may also authorize the use of force

for the protection of American nationals abroad.[26]

This view was supported by the Supreme Court in the Neagle case, which involved the use of force domestically upon Presidential authority, in this instance by a United States marshal assigned to protect Supreme Court Justice Field.[27]

To defend the marshal the Court adopted an expansive view of Presidential power under Article II, section 3, which states that "he shall take care that the laws be faithfully executed." "Is this duty," the bench asked rhetorically,

> limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?[28]

The answer came by way of example, and the example, the Martin Koszta incident, involved foreign affairs. It seems that the Hungarian-born Koszta, who had begun the process of becoming a naturalized citizen, was seized by the Austrian military while in Smyrna, and not released until an American war ship turned its guns on the Austrian vessel

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[26]Durand v. Hollins, 4 Blatch. 451 (C.C.S.D.N.Y. 1860). See my study on the Boxer incident, chap. 4, supra.

[27]In re Neagle, 135 U.S. 1 (1890).

[28]Ibid., p. 64.

in which he was being held captive.[29]

"Upon what act of Congress then existing," queried the Court after relating the incident, "can any one lay his finger in support of the action of our government in this matter?" There was none, of course, the point being that none is necessary when the President authorizes force for the protection of United States citizens, or even inchoate citizens.[30]

The dissenters complained that Koszta's rescue was a bad example because it involved foreign nations,

> and in our intercourse with them, states and state governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown . . .
>
> That authority the Constitution vests expressly and conclusively in the treaty-making power--the President and the Senate . . .[31]

Having thus distinguished Presidential power in foreign and domestic affairs, thereby anticipating the rationale in the famed Curtiss-Wright case, the dissenters conceded as much power to the President in the conduct of international relations as did the majority. Thus no member of the Supreme Court would have denied the President's authority to act as he did in defense of Koszta, and by inference, other Ameri-

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[29]Ibid.

[30]Ibid.

[31]Ibid., p. 85.

cans in peril abroad.

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The doctrine of the double standard in the exercise of Presidential power, i.e., greater restrictions in domestic as opposed to foreign policy, only briefly treated by the Neagle dissenters, received full-blown elaboration in the 20th century. In United States v. Curtiss-Wright Export Corporation, seven of the eight participating Supreme Court justices upheld the President's authority to embargo arms sales to the Chaco pursuant to a joint resolution of Congress.[32]

Of course, we may not equate the power to embargo arms with the power to initiate hostilities, and Curtiss-Wright did involve an act of Congress. Nonetheless, Justice Sutherland wrote about Presidential power in such sweeping terms, and the theory upon which the decision rests is so extraordinary that the case has become of general significance to all analyses of executive authority in international affairs.

Sutherland reasoned that there was a "fundamental" difference between Federal powers in foreign as opposed to domestic affairs, that the latter were "carved from the mass of state powers" by the Constitution, while the former passed

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[32]United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

from the British Crown to the colonies collectively to the Continental Congress and finally to the Federal government under the Constitution. "It results," the Court contended,

> that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.[33]

Thus, the Federal government possesses those foreign affairs powers that are "inherently inseparable from the concept of nationality" whether or not they are granted by the Constitution. Furthermore, notes Sutherland, "the exercise of the {foreign affairs} power is significantly limited."

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord

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[33]Ibid., pp. 315-18

> to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[34]

In sum, the Federal government possesses foreign affairs powers independent of Constitutional warrant, the exercise of these powers must often be restricted to the President, and Congress may delegate its foreign affairs powers to the President in accordance with standards less stringent than those applied to delegations respecting internal affairs.

How this affects Presidential war-making authority is not entirely clear, especially since Article I, section I, clause 11 expressly delegates to Congress the power to declare war. At a minimum it would seem that our earlier statement that there is a double standard for gauging Presidential power is correct: when it comes to foreign affairs Congress may more freely delegate its powers to the Executive. I have argued elsewhere that resolutions authorizing the President to use force at his discretion, (e.g., Tonkin Gulf, 1964), are valid delegations under the Curtiss-Wright doctrine.[35]

Beyond that, the contours of that "very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations" are left to practice and case-by-case determination.

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[34]Ibid., pp. 318, 319-320.

[35]See my chap. 8, text accompanying notes 122-123, supra.

On other occasions, in cases dealing with foreign affairs, notably the power to make and give domestic effect to international agreements, the High Court has suggested that Federal power is free of some of the usual constitutional restraints.

Missouri v. Holland is the most famous of these, and here Justice Holmes swept aside a state challenge to a treaty and the law effectuating it, declaring that they could not be held "forbidden by some invisible radiation from the general terms of the Tenth Amendment." This despite the fact that similar legislation (regulating migratory birds) enacted prior to the treaty had been found bad in Federal court.[36]

In short, the treaty-makers, viz., the President and the Senate, could do that which the whole Congress acting without them could not. But if the treaty power is not limited by the Tenth Amendment, is it also free of other constitutional restrictions? A nineteenth century judge, Mr. Justice Field, thought not.

In Geofroy v. Riggs, Field declared that the treaty power delineated in the Constitution

> is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the govern-

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[36]Missouri v. Holland, 252 U.S. 416, 434 (1920).

> ment itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent.[37]

And more recently it has been suggested that the Bill of Rights protects citizens abroad, any international agreements regulating their treatment to the contrary notwithstanding. Justice Black spoke for himself and three other judges when he so declared in Reid v. Covert. The case dealt with a Congressional act providing for trial by courts-martial of the civilian dependents of servicemen stationed overseas. Under certain international agreements between the United States and the host countries, American soldiers accused of a crime could be so tried.[38]

Note Black's implicit rejection of the Curtiss-Wright doctrine of extra-constitutional Federal powers.

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution . . . .
>
> Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that {the law being challenged}. . . can be sustained as legislation which

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[37]Geofroy v., Riggs, 133 U.S. 258, 267 (1890).

[38]Reid v. Covert, 354 U.S. 1 (1957).

> is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government which is free from the restraints of the Constitution . . .
>
> There is nothing in this language {of the Supremacy Clause} which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution . . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[39]

Thus, while the Migratory Birds Case establishes that the Tenth Amendment is no limitation upon the treaty power, Reid makes clear that other restrictions, such as the Jury Trial clause of the Sixth Amendment, do apply

When the President makes "executive agreements" with foreign nations solely on his own authority, is the Tenth Amendment equally inapplicable? Apparently so, for in United States v. Belmont, the Court stated that

> {i}n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.[40]

The implication of all of the above cases for Presidential war-making is, once again, unclear. But the general thrust is that the Federal government, quite often the President alone or in conjunction with the Senate, may exercise

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[39]Ibid., 5-6, 16-17, footnotes omitted.

[40]United States v. Belmont, 301 U.S. 324, 331 (1937); see also United States v. Pink, 315 U.S. 203 (1942).

powers in foreign affairs free of many of the limitations derived from Federalism or the Separation of Powers.

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The Curtiss-Wright and Missouri v. Holland cases, which take an expansive view of Presidential power, also involve authorizing acts of Congress. What if this legislative support were absent?; or what if the President acted contrary to the will of Congress? Two landmark cases, only one of which concerned foreign affairs even obliquely, considered the scope of Presidential power under just these circumstances--and arrived at somewhat conflicting conclusions.

The first, Myers v. United States, involved the President's power to fire an executive officer without obtaining the advice and consent of the Senate as expressly stipulated by an act of Congress. The President ignored the law, claiming in effect that he was not bound by the will of Congress when that body encroached upon the constitutional powers of the Executive.[41]

The Court upheld the President on the grounds that removal power was indeed part of the general executive power vested in the President by Article II, section 1, was necessary if he were to "take Care that the Laws be faithfully executed," as required by Article II, section 3, and could not therefore be exercised by Congress without violating the

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[41]Myers v. United States, 272 U.S. 52 (1926).

Separation of Powers principle.[42]

Chief Justice Taft, who wrote for the majority, considered the "executive power" and "take Care" clauses to be positive grants of authority rather than commands to work the will of Congress. Thus, when Congress declared that the removal of postmasters first class required Senate consent, it was encroaching upon this Presidential authority, and he could rightfully ignore the law.

To which Justice Holmes, dissenting, retorted:

> The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.[43]

Taft's sweeping claims for Presidential removal power, and much of the constitutional theory upon which they were based were later disavowed by the Court in the celebrated Humphrey's Executor case. But Myers was never reversed, and the notion that the President may defy Congress when that body trespasses upon the Executive realm is still vital. The Myers Court clung to this position even in the face of the impeachment of President Andrew Johnson for defying a law similar to the one at issue in 1926.[44]

The Separation of Powers principle may, however, cut

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[42]Ibid.

[43]Ibid., p. 177.

[44]Humphrey's Executor v. United States, 295 U.S. 602 (1935).

two ways: it can be invoked against a President who "guesses incorrectly" about the scope of his authority. This is exactly what happened in the famous Steel Seizure Case.[45]

Here the Supreme Court upheld an injunction against the Secretary of Commerce, who had been directed by the President to temporarily seize the steel mills in order to avert a strike. The executive order cited no statutory authority, but noted the threat to the national defense posed by a work stoppage during the Korean War. The President did not invoke the Taft-Hartley Act, which provided for a "cooling-off" period. When this Act was passed in 1948, Congress rejected an amendment authorizing emergency seizures.[46]

Two judges, Black and Douglas, adopted the narrow view of Presidential authority rejected in Myers. Said Black:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.[47]

Since providing for seizures is a legislative, not an executive act, the President violated the Separation of Powers. The rest of the Court seemed to agree with Justice

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[45]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See also chap. 7, supra.

[46]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[47]Ibid., p. 587.

Frankfurter's comment that

> the considerations relevant to the legal enforcement of the principle of separation of powers seem . . . more complicated and flexible than may appear from what Mr. Justice Black has written . . .[48]

Frankfurter considered the President in conflict with the legislature because Congress withheld the seizure power from him when it passed the Taft-Hartley Act. Justices Clark and Burton condemned the President for failing to adopt measures short of seizure as provided by Congress in Taft-Hartley in case of industrial disputes. Justice Jackson provided a formula for gauging Presidential power, and found President Truman's action in the instant case to fall in the least defensible category because it was undertaken without regard for the methods which Congress precribed for conducting seizures.[49]

But none of the above-named judges rejected outright the concept of inherent Presidential powers to meet emergencies, upon which the three dissenters relied. (Actually, five of the judges approved the doctrine, two were non-committal, and two rejected it.) Thus, the essence of the Youngstown rule is not that the President is limited to executing statutory law, but rather, that where Congress has laid down policy guidelines the President may not simply disregard them.

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[48]Ibid., p. 589.

[49]Ibid., pp. 602-603, 663, 657-59, 639.

The corollary is also true, i.e., where Congress has not established guidelines, Presidents may, under certain circumstances not easily defined in advance, fill the void on their own authority. This corresponds with category two of Jackson's formula.

> When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.[50]

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The importance of Youngstown for Presidential war-making power is difficult to assess. The initiation of hostilities short of "war," as the term is used in Article I, section 8, clause 11, is probably one of those twilight zone powers--or at least had been until the War Powers Act of 1973.

It has been argued that because Federal courts were willing to decide the merits of the Steel Seizure controversy, they should also have taken jurisdiction in cases challenging the legality of the Vietnam War. Consider Justice Douglas' statement in one of his several dissents.

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[50]Ibid., p. 637.

> In the Steel Seizure Case members of this Court wrote seven opinions and each reached the merits of the Executive's seizure. In that case, as here, the issue related to the President's powers as Commander-in Chief and the fact that all nine Justices decided the case on the merits and construed the powers of a coordinated branch at a time of extreme emergency should be instructive.[51]

Perhaps so, but the required four Justices necessary to grant appeals were never persuaded. Furthermore, unlike the Vietnam War cases, Youngstown did not directly involve foreign affairs, traditionally (as we shall demonstrate further) an area of judicial abstinence. That Justice Jackson recognized the distinction is indicated by his comment.

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.[52]

Jackson's reference to the power of the Commander-in-Chief in the event of "rebellion" suggests also that he did not want his opinion to be construed as a refutation of the doctrine enunciated in the Prize Cases. Justice Burton's concurring opinion made a similar distinction.

The present situation is not comparable to that of

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[51]Massachusetts v. Laird, 400 U.S. 886, 898 (1970).

[52]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952). (concurring opinion).

> an imminent invasion or threatened attack. We do not face the issue of what might be the Presidential power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war.[53]

The Steel Seizure Case, then, leaves matters just as inconclusive as they had been. It not only does not demolish the idea of inherent Presidential power in foreign affiars, it probably does not even do so for domestic affairs.[54]

Writing in 1917, Professor Corwin observed

> the lack . . . of definite legal criteria for determining the scope of the President's powers in the field of foreign relations and for deciding those contests for power in this field which have frequently occurred between the President and Congress or the President and the Senate. Such criteria lack because the courts have never had occasion to develop them . . .[55]

This is not to say that opportunities were not available, but rather that the courts have been reluctant to step in when cases involving foreign affairs have arisen. The refusal of the Supreme Court to grant certiorari to thirteen legal challenges to the Vietnam War is consistent with past practice.[56]

Judicial non-involvement has been rationalized

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[53]Ibid., p. 659.

[54]C. Herman Pritchett, The American Constitution, 2d ed. (New York: McGraw-Hill Book Co., 1968), pp. 340-341.

[55]Corwin, President's Control, pp. 166-167.

[56]See my chap. 8, note 93, supra.

through the use of the "political questions" doctrine. One observer notes, however, that the Supreme Court did not invoke this doctrine with the Vietnam War cases, and attributes this fact to a desire on the part of the justices to avoid foreclosing the option of ruling upon the War's constitutionality should the political climate have permitted.[57]

As early as 1829, Chief Justice John Marshall invoked the political questions doctrine in a case involving the interpretation of an international agreement. Foster v. Neilson presented a dispute of title to land said by one party to have been ceded by Spain to France and ultimately to the United States as part of the Louisiana Purchase. The other party, relying upon the Spanish understanding, denied that the disputed territory had been ceded.[58]

Justice Marshall announced that it would be odd for American courts to reject an interpretation given a treaty by the United States government. He continued as follows.

> If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the

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[57]Phillipa Strum, "The Supreme Court and the Vietnam War." in Richard A. Falk, ed., The Vietnam War and International Law, 4 vols. (Princeton, N.J.: Princeton University Press, 1968-1976), 4(1976):561-562.

[58]Foster v. Neilson, 2 Pet. (U.S.) 253 (1829).

> boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the Legislature.[59]

Thus did the Marshall Court refuse to decide the controversy. We already noted that while the Court reached the constitutional issues in the Prize Cases, it invoked the political questions doctrine and denied authority to judge a Presidential decision that war had been thrust upon the country. And in the case of The Protector, the Court found it "necessary to refer to some public act of the political departments," namely Lincoln's proclamations, in order to determine the dates of the commencement and termination of the Civil War.[60]

There are numerous other statements of judicial deference to the "political" branches, including one noted in an earlier chapter in a case stemming from the Pancho Villa episode. The statement, which follows, was described in Baker v. Carr, the most elaborate Supreme Court discussion of the political questions doctrine, as a "sweeping" one, "to the effect that all questions touching foreign relations are political questions."[61]

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[59]Ibid., p. 309, emphasis added. See also Williams v. Suffolk Insurance Co., 13 Pet. (U.S.) 415, 420 (1839); and cases cited in Henkin, p. 451, note 27.

[60]See text accompanying notes 16-17, supra. Freeborn v. The Ship Protector, 12 Wall (U.S.) 700, 20 L. Ed. 463, 464 (1871).

[61]Baker v. Carr, 369 U.S. 186, 211 (1962).

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative--'the political'--Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.[62]

Oetjen involved the determination of the international status of the Carranza regime insofar as the United States was concerned, and it was this very determination that the Court dubbed "political." But Oetjen broke no new ground since Chief Justice Marshall asserted back in 1818 that questions of the international status of rebel governments "are generally rather political than legal in their character."[63]

The Supreme Court has also held the vitality of international agreements to be a question for the other branches to decide.[64]

And it has left to the Executive branch the determination of whether or not the vessels of a foreign government are immune from American judicial processes.[65]

The Court has also shied away from interfering with

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[62]Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1917).

[63]United States v. Palmer, 3 Wheat. (U.S.) 610, 634 (1818). But see United States v. The Three Friends, 166 U. S. 1, 63-65 (1896).

[64]John Doe ex dem. Clark, et al. v. Braden, 16 How. (U.S.) 635, 657 (1853); Terlinden v. Ames, 184 U.S. 270, 288 (1901); and cases cited in Henkin, p. 451, note 28.

[65]Ex parte Republic of Peru, 318 U.S. 578 (1942); Republic of Mexico v. Hoffman, 324 U.S. 30 (1944).

Presidential control over C.A.B. decisions to grant overseas air routes, on the grounds that Presidential determinations are based upon information in foreign affairs available to him. Regarding the revelation of such information the Court said:

> But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.[66]

There is also dictum to the effect that challenges to the dispatch of American troops abroad by the Commander-in-Chief are not adjudicable. The statement, quoted below, came in a case involving the trial by military commission of German nationals accused of spying on behalf of Japan before the latter surrendered in World War II. The Commission was convened in China and the defense challenged its authority in the face of Sino-American agreements that United States troops would not be stationed in China.

> Certainly it is not the function of the Jucidiary to entertain private litigation--even by a citizen--which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region . . . . The issue . . . involves a challenge to the conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.[67]

Finally, I have found ten cases challenging the con-

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[66] Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1947).

[67] Johnson v. Eisenstrager, et al., 339 U.S. 763, 789 (1949).

stitutionality of the Vietnam War where lower federal courts invoked the political questions doctrine. It should be noted that the Supreme Court refused to review any of these cases where asked, with the sole exception of the Atlee decision which it affirmed without comment.[68]

We must also point out, however, that lower federal courts reached the merits in fourteen legal challenges to the Vietnam conflict, and the Supreme Court did not review any of these either.[69]

What may be concluded from this survey of judicial statements on foreign affairs and "political questions?" With respect to our chief concern, the power of the President to initiate hostilities without a Congressional declaration of war, the Supreme Court has neither reached the merits nor invoked the political questions doctrine with finality. While one scholar concludes that

> {w}ar power issues are essentially and inherently political and not legal{,}

the Supreme Court, in Baker v. Carr, warns us that

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[68]Atlee v. Laird, 347 F. Supp. 689 (E.D.Pa. 1972), aff'd, 411 U.S. 911 (1973); Da Costa v. Laird, 471 F. 2d 1146 (2d Cir. 1973); Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973), aff'd, 502 F. 2d 1158 (1st Cir. 1973); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972); Head v. Nixon, 342 F. Supp. 521 (E.D. La. 1972), aff'd, 468 F. 2d 951 (5th Cir. 1972); Holtzman v. Schlesinger, 484 F. 2d 1307 (2d Cir. 1973); Luftig v. McNamara, 373 F. 2d 664 (D.C. Cir. 1967); Mora v. McNamara, 387 F. 2d 862 (D.C. Cir. 1967); Sarnoff v. Connally, 457 F. 2d 809 (C.D. Cal 1972).

[69]Cited in chap. 8, note 95, supra.

> it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.[70]

Professor Henkin suggests that the Court has never established a doctrine of "extraordinary judicial abstention from constitutional review" in any foreign affairs case. Rather, he contends, where the Court has declared some issue to be appropriate for the "political branches," it was in fact deciding that the Constitution gave those institutions authority over the issue.[71]

But even if this were so, the results to date are still the same: there is no authoritative High Court ruling on Presidential war-making. And this is true because, as Professor Henkin admits, when it comes to foreign affairs, the Supreme Court

> intervenes only infrequently and its . . . cases are few and haphazard.[72]

If the Supreme Court resisted the temptations and challenges of the Vietnam era it is likely to do so again when the issue of Presidential war-making power is raised in the future. On the other hand, in a less emotional political climate than that of the Vietnam War period, the Jus-

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[70]Don Wallace, Jr., "The War-Making Powers: A Constitutional Flaw?" in Richard A.Falk, ed., The Vietnam War and International Law, 4 vols, (Princeton, N.J.: Princeton University Press, 1968-1976), 4 (1976):670; Baker v. Carr, 369 U.S. 186, 211 (1962).

[71]Henkin, pp. 213-214.

[72]Ibid., p. 224.

tices might choose to assert themselves.

It seems safe to conclude that while past practice in the broad area of foreign affairs suggests judicial inaction in the future, there is no authoritative ruling precluding such action. Insofar as the Constitution means what the judges say it means, then it is still, as Corwin described it, "an invitation to struggle"--not only for the privilege of directing foreign policy, but for the awesome responsibility of initiating hostilities. And, in the absence of any ahthoritative Supreme Court ruling on the matter, this is truly in the hands of the "political branches."[73]

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[73]Corwin, President's Control, p. 171.

CHAPTER XI

CONCLUSION

We are dealing in an area where the Constitution is the Constitution of practice.

Alexander M. Bickel

When the late Professor Bickel made this comment, he was encouraging a House subcommittee to draft war powers legislation.[1] He meant that legislation respecting war powers, like Presidential statements and legislative debates on this issue, were akin to Supreme Court opinions in giving authoritative meaning to the Constitution.[2]

Thus if a constitutional theory of Presidential war powers is to be developed, it must rely not only upon the intent of the Framers of the Constitution, but upon the views of Congress, the President and the Courts over the sweep of American history. In the course of this study we have examined these views in detail as well as the events that prompted them. Now we attempt to develop a theory of Presidential war-commencing power.

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[1]U. S., Congress, House, War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, 93d Cong., 1st sess., 1973, p. 181.

[2]Ibid., p. 198.

The Intent of the Framers

The United States Constitution unambiguously vests the power to declare war in the Congress, not the President.[3] By this phraseology it was intended that Congress participate in all non-emergency decisions to go to war. Even Hamilton, defender of Presidential primacy in foreign affairs, conceded this.

> The legislature alone can interrupt those blessings [of peace], by placing the Nation in a state of War.[4]

The phrase "non-emergency decisions" is designed to permit exclusion of Congress from necessarily instantaneous determinations to defend the country against attack or imminent threat thereof. Thus, the theory of the Constitution is that in cases of grave threat to the nation's security, where the need for rapid response precludes

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[3] U. S. Const., art. I, sec. 8, cl. 11. If the declaration is made by bill or joint resolution, the President has to sign it, or if he wishes, veto it. Cf. Louis Henkin, Foreign Affairs and the Constitution (Mineola, N. Y.: The Foundation Press, Inc., 1972), pp. 5, 295, note 5. This has never happened, but President Cleveland once threatened to disregard a declaration of war. Edward S. Corwin, The President: Office and Powers (New York: New York University Press, 1948), p. 476, note 93.

[4] Alexander Hamilton, The Papers of Alexander Hamilton, ed. Harold C. Syrett (New York: Columbia University Press, 1961--), 15 (1969):42.

executive-legislative consultation, the President may act on his own authority.[5]

Logically, such a theory of emergency Presidential power would seem to extend to the defense of American citizens, soldiers and properties (including territorial possessions) overseas. However, there is no mention of these powers in the writings of the Framers or in commentaries of that period. Perhaps, given America's circumstances in 1789, the Founders simply did not anticipate permanent army bases overseas, or foreign policy interests of a global nature.

There is a second omission in the original understanding of the war powers: there is no distinction between "war" and hostilities short of war.[6] This may have been intentional, in which case all hostilities are subsumed under the term "war." Under such an interpretation, the Congress and not the President rightfully controls all but emergency-motivated hostilities.

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[5] This was one of the purposes of changing the phrase "make War" to "declare War" in art. I, sec. 8, cl. 11 of the Constitution. Max Farrand, ed., The Records of the Federal Convention of 1787, 3 vols. (New Haven: Yale University Press, 1927), 2:318. The Supreme Court affirmed this doctrine in Prize Cases, 2 Bl. (U. S.) 635 (1863).

[6] This was pointed out during debate on the Quasi War. See Gallatin's comments, chap. 2, note 47, supra.

If this be so, then the President's power to commence hostilities was intended to be narrow indeed. But there is yet another issue remaining unclarified, viz., who was meant to conduct the foreign policy of the United States on a day-to-day basis? More particularly, who was intended to have control over the armed forces, including the authority to employ them as a threat in order to obtain diplomatic objectives?

The President has the "executive Power"[7] and is the Commander-in-Chief of the armed forces,[8] but has he the power to deploy the armed forces and threaten to use them in pursuit of American foreign policy objectives? If the President need not obtain prior Congressional approval for such deployments, then the legislative monopoly over the commencement of hostilities is easily broken. Forces deployed as a threat are easily drawn into actual hostilities, thus presenting Congress with a fait accompli.

While this might lead one to conclude that the Framers must have intended that Congress approve any deployments of this nature, such a conclusion would be premature. First, there is no evidence that this was intended. Second, its implications for the conduct of foreign relations today might be revolutionary indeed: the President might be

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[7] U. S. Const. art. II, sec. 1, cl. 1.

[8] Ibid., art. II, sec. 2, cl. 1.

denied the power "to make a credible threat to use force."[9]

For example, before responding to the Soviet emplacement of nuclear missiles in Cuba with a naval quarantine of the island, President Kennedy would, under this theory, have had to obtain Congressional permission, thus increasing the chances of a breach in security, and perhaps altering irrevocably the delicate diplomacy so essential to success.[10]

The failure of the Framers to clarify the respective roles of Congress and the President in the conduct of foreign relations leaves a great deal of the war-making issue to be resolved by inter-branch power struggle. However, even if hostilities do issue out of a Presidential deployment in the conduct of foreign relations, there is nothing to prevent Congress from being asked to give approval once it appears that the incident is developing into "war" in the Constitutional sense.

In fact, Article I, section 8, clause 11 requires that Congress authorize all protracted and large-scale hostilities regardless of how they were initiated. This,

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[9] Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act," Texas Law Review 50 (May 1972):833, 896.

[10] See Graham T. Allison, The Essence of Decision: Explaining the Cuban Missile Crisis (Boston: Little, Brown & Co., Inc., 1971), passim.

it seems to me, is the essence of that provision. In short, while the Framers allowed for unilateral Presidential response in case of national emergency, and while they did not make clear which branch was to control the conduct of foreign relations, thus paving the way for Presidential predominance, they did require that "war," defined as protracted and large-scale hostilities, be authorized by the legislature.[11]

The Effects of Practice I

It was left for actual practice to clarify many of the ambiguities of the Constitution. This is not to say that all actions are self-legitimating; we must also take into account the critical comments of legislators and the commentaries of scholars. Nor do we accept as conclusive of Presidential authority the long list of hostilities abroad without a declaration of war.[12]

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[11] See my chap. 1, supra.

[12] An aide to Senator Goldwater listed 199 such events. House War Powers Hearings 1973, pp. 328-66. Other compilations have been made by Milton Offutt, Protection of Citizens Abroad by the Armed Forces of the United States (Baltimore: Johns Hopkins University, 1928); J. Reuben Clark, The Right to Protect Citizens in Foreign Countries by Landing Forces, 2d Rev. Ed. (Washington, D. C.: Government Printing Office, 1929); and James Grafton Rogers, World Policing and the Constitution (Baltimore: World Peace Foundation, 1945).

However, there have been some practices which were repeated so often, and which gained such acceptance in executive, legislative and scholarly circles, that they have of necessity become a part of the corpus of Presidential war power.

The first ambiguity clarified involved the matter of hostilities short of war. The Framers of the Constitution did not distinguish between hostilities and war power. However, in the earliest years of the Republic, President John Adams ordered, without a full-fledge declaration of war, but with prior Congressional authorization, naval action against France.[13]

Adams nearly approached Congress to ask for a full-blown declaration of war on more than one occasion, but changed his mind. Congress too was aware of the distinction between the quasi-war they authorized and all-out war. And in two distinct cases arising out of the conflict, the Supreme Court clearly distinguished between "perfect" or "imperfect" war, and "general" or "partial" hostilities, saying that Congress could authorize either.[14]

As a result of the Quasi War with France, 1797-1801, the distinction between war and hostilities short of war was firmly established. However, it was not established

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[13]See my chap. 2, supra.

[14]Ibid. The cases are Bas v. Tingy, 4 Dall. (U. S.) 37 (1800), and Talbot v. Seeman, 1 Cr. (U. S.) 1 (1801).

that the President could authorize these hostilities on his own authority. Although there were in fact naval operations in the Quasi-War that exceeded the limits established by Congress, the Supreme Court later held that the President had no authority to exceed Congressionally imposed limitations on the conduct of hostilities.[15]

Thus, with the Quasi War, the legitimacy of hostilities short of war was established. However, the respective powers of Congress and President in this area were not yet fixed, as the bulk of this study clearly indicates.

A second issue not clarified by the Framers, the threat of force in diplomacy, also received early clarification in practice. The whole question of control over foreign relations in general was debated by Madison and Hamilton following Washington's Proclamation of American neutrality in the war between Britain and France.[16] Ironically, Jefferson, who had urged Madison to defend Congressional power, came to assert Presidential control over the threat of force for diplomatic purposes.

In May 1801, while Congress was not in session, President Jefferson dispatched a naval force to the Mediterranean as a show of force against the Barbary coast

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[15]Little v. Barreme, 2 Cir. (U. S.) 169 (1804).

[16]The Proclamation was issued in 1793. The debate was conducted that same year in the press under the pseudonyms Helvidius and Pacificus. See chap. 1, supra.

states. Months later, Jefferson informed Congress and justified the operation on the grounds that it was defensive in nature.[17] To add to the irony, fourteen years later Madison himself ordered a show of force off the Barbary coast in excess of Congressional authorization.[18]

While these events by no means settle the dispute over control of foreign relations, they do serve as early examples of Presidential assertion of authority. In fact, American diplomatic history is replete with such assertions, many of which I did not discuss in this study because the episode did not lead to large-scale, protracted hostilities or because Congress declared war. Consider the following description of the period in American history dating from 1809 to 1829.

> Although Presidents during this period claimed no inherent authority to initiate military actions, Madison and particularly Monroe secretly used their power in ways that could have been justified only by some sweeping and vague claim--such as the right to use the armed forces to advance the interests of the United States.[19]

The author goes on to note the seizure of Baton Rouge and parts of West Florida in 1810, and Andrew Jackson's raid on East Florida in 1818, with the indulgence, if

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[17] See chap. 3, supra.

[18] Ibid.

[19] Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins (Cambridge, Mass.: Ballinger Publishing Co., 1976), p. 378.

not the approval of President Monroe.[20] Other significant deployments in the 19th century include the movement of troops to Texas in 1844 to insure her independence from Mexico,[21] and the dispatch of 50,000 men to the Texas-Mexico border by President Grant in 1865-1866.[22]

In the 20th century there have been these additional mobilizations and deployments. In 1903, Theodore Roosevelt sent marines to Panama to insure her successful revolt against Columbia.[23]

In 1914, President Wilson ordered the occupation of Vera Cruz, Mexico, in order to topple the military government there. Congress resolved that the President was "justified," but it was not asked to authorize his actions.[24]

In fact, throughout the first decades of the 20th century, the United States was notorious for its "gunboat diplomacy," especially in the Caribbean. Perhaps the most blatant example of this was the occupation of Nicaragua from 1926 to 1933, initiated solely under President Coolidge's authority.[25]

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[20] Ibid.

[21] House War Powers Hearings 1973, p. 333.

[22] Thomas A. Bailey, A Diplomatic History of the American People, 9th ed. (Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1974), p. 353.

[23] Ibid., p. 493.

[24] See my chap. 5, supra.

[25] Bailey, pp. 678-79.

And, since the Second World War there have been the following significant forceful demonstrations. President Eisenhower sent 5,000 marines to Lebanon in 1958.[26] President Kennedy placed a naval quarantine around Cuba in 1962.[27] Marines were sent to the Dominican Republic in 1965 by President Johnson.[28] And during conflict in the middle east in 1973, President Nixon put all American forces on alert as a warning to the Soviet Union.[29]

Each of the military actions cited was undertaken without specific legislative approval, and although other justifications were often advanced, the principal motivation was to promote United States foreign policy. In addition, before each of the following wars, eventually declared

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[26] Ibid., pp. 850-851. With additional units troop totals reached 14,000. President Eisenhower did not rely upon the Resolution of March 9, 1957, which declared that the United States ". . . is prepared to use armed forces to assist" those Middle Eastern states requesting aid "against armed aggression from any country controlled by institutional communism . . . consonant with the treaty obligations . . and the Constitution of the United States." 71 Stat. 5 (1957). For Eisenhower's explanation to Congress, see Department of State Bulletin 39 (August 4, 1958):182.

[27] Allison, passim.

[28] Bailey, pp. 901-902.

[29] New York Times, 26 October 1973, p. 1.

by Congress, there were significant military actions undertaken by Presidents acting unilaterally.

President Polk moved troops into disputed territory between Mexico and the United States before the Mexican War in 1846.[30] President Wilson armed American merchantships in 1917, before Congress declared war against Germany.[31] And before the Second World War, President Franklin D. Roosevelt exchanged destroyers for bases on British soil, and ordered the occupation of both Greenland and Iceland, despite an act of Congress prohibiting the use of inductees outside the Western Hemisphere.[32]

In practice, then, Presidential authority to threaten the use of force by deploying the armed forces abroad is well established. By implication, Congress conceded as much when it passed the War Powers Resolution which provides for termination by Congress of Presidentially-initiated hostilities, but requires only a report when the President deploys combat troops to a foreign country and neither hostilities nor imminent hostilities are involved. Deployments in international waters not involving hostilities need not even be reported.[33]

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[30]See chap. 2, note 2, supra.

[31]House War Powers Hearings 1973, pp. 349-350.

[32]Ibid., p. 354; Selective Training and Service Act of 1940, 54 Stat. 885 (1940). See Edward S. Corwin, Total War and the Constitution (1947; reprint ed., Freeport, N. Y.: Books for Libraries Press, 1970), pp. 22-34.

[33]Pub. L. 93-148, 87 Stat. 555 (1973). See my chap. 11, supra.

Courts and the Effects of Practice II

When we examine the views of the Federal courts respecting war powers, we find only a stray word here, possible grounds for inference there, discussions of Congressional power, and refusals to decide on "political question" grounds[34] or on no grounds at all.[35]

In one area not fully elucidated by the Framers, that of protection of citizens and property overseas, courts have come down on the side of Presidential power; and practice has confirmed what the judges have pronounced.

In the Slaughterhouse Cases it was said that one of the privileges a citizen of the United States could demand is

> the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government.[36]

If so, then it is likely that the President will have at least the initial responsibility for meeting that demand. And this implies that he has the power to do so.

The clearest expression of judicial support for this view came in Durand v. Hollins, in which a Supreme

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[34] See, e.g., Oetjen v. Central Leather Co., 246 U. S. 297 (1917).

[35] See the Vietnam War cases, chap. 8, note 93, supra.

[36] Slaughterhouse Cases, 16 Wall. (U. S.) 36, 79 (1873).

Court justice riding circuit held that the President has full power to interpose with force in order to protect citizens and their property abroad.[37]

Apparently this extends to the protection of those in the process of becoming citizens as well, as the Supreme Court affirmed when discussing the Martin Koszta incident in Neagle's case.[38]

In Neagle it was suggested that the President needed no laws or treaties to come to the aid of citizens abroad.[39] Scarcely a decade passed before President McKinley asserted just such power in dispatching 5,000 soldiers to China to aid American ambassadorial personnel and Chinese converts to Christianity beseiged by the Boxers. Congress was not in session when McKinley acted, and the success of the enterprise precluded any criticism when the legislature reconvened.[40]

In defensive action of a different sort, President Wilson, without Congressional authorization, sent the Pershing expedition deep into Mexico in pursuit of Pancho Villa, following the latter's raid on an American city.

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[37] Durand v. Hollins, 8 F. Cas. 111 (No. 4,186) (C.C.S.D.N.Y. 1860).

[38] In re Neagle, 135 U. S. 1, 64 (1890).

[39] Ibid.

[40] See my chap. 4, supra.

Villa eluded Pershing for nearly a year (1916-1917), whereupon the force was withdrawn.[41]

In 1973, when the United States Senate was in a less than charitable mood when it came to Presidential powers, a war powers measure containing the following language was approved.

> . . . this Act is not intended to encroach upon the recognized powers of the President, as Commander in Chief and Chief Executive, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to repel attacks or forestall the imminent threat of attacks against the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens and nationals of the United States located in foreign countries.[42]

In sum, the Senate recognized what the courts and practice had established, and what, given the institutional capabilities of Congress and the President, could hardly be otherwise.

Treaties and Area Resolutions

Since World War II the United States has been involved in two major armed conflicts, one in Korea (1950) and one in Indochina (1965). If "war" in the Constitutional

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[41] See my chap. 5, supra.

[42] U. S., Congress, Senate, A Bill to Make Rules Governing the Use of the Armed Forces of the United States in Absence of a Declaration of War by the Congress, S. 440, 93d Cong., 1st sess., 1973, p. 2. This measure was adopted by the Senate 20 July 1973. 119 Cong. Rec. 25119 (1973).

sense is to be defined by the magnitude of the conflict, both in terms of size of the troop-involvement and duration of the hostilities, then surely these were "wars."

The State Department defended President Truman's dispatch of forces to Korea on the grounds that the United States had signed the United Nations Treaty, and the United Nations Security Council had recommended action in defense of South Korea.[43] Although Congress fully supported the war at its onset, appropriated money, and drafted troops to conduct it, there was never any explicit authorization for the conflict.[44]

Practice would seem to have established that the President, as Chief Executor of treaties and Commander-in-Chief of the armed forces may initiate war on his own authority. However, I believe this argument will not stand scrutiny. The Korean episode has no analogue in American history. At no time before 1950 was a conflict of such major proportions begun and conducted solely upon the President's authority to enforce treaties.

Furthermore, the contention that a treaty could justify a President in conducting war, in the Constitutional

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[43] U. S., Department of State, Memorandum of July 3, 1950, in U. S., Congress, House, Background Information on the Use of United States Armed Forces in Foreign Countries, H. Rept. 127, 82d Cong., 1st sess., 1951, pp. 49-54.

[44] See my chap. 7, supra.

sense of that term, is without foundation. As the Supreme Court made clear in Reid v. Covert, treaty provisions may not conflict with the Constitution.[45] Quite simply, this means that while the United States may commit itself to go to war in defense of a treaty partner, it may not fulfill that commitment in violation of Art. I(8)(11) of the Constitution, which vests the power to declare war in the Congress.[46]

It could hardly be said, then, that the President gains from a treaty the authority to violate the Constitution by imposing upon Congress' war powers. If the phrase, "in accordance with . . . constitutional processes," inserted into a number of our major defense treaties[47] is to be any more than a mere redundancy, it must mean that the United States is not obligating itself to act in a manner inconsistent with proper Constitutional procedure. And under the Constitution both houses of Congress are needed to authorize a war,[48] whereas only the Senate need approve a treaty.[49]

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[45] Reid v. Covert, 354 U. S. 1 (1957).

[46] Nor did the Court hold to the contrary in Missouri v. Holland, 252 U. S. 416 (1920). The rule there is that the Tenth Amendment does not limit the treaty-making power.

[47] See e.g., North Atlantic Treaty, arts. 5 and 11.

[48] U. S. Const. art. I, sec. 8, cl. 11.

[49] Ibid., art. II, sec. 2, cl. 1.

The State Department also defended the Vietnam War on the basis of treaty, the SEATO pact and Protocol; only in this case there was also an act of Congress, the notorious Tonkin Gulf Resolution.[50] In my view, however, the Tonkin Resolution and the SEATO pact plus Protocol, taken together did justify the President's use of force in Vietnam. The language of the Resolution was sufficiently broad, and the debates on the floor of the Senate sufficiently clear to conclude that Congress intended to give the President the authority to order the use of force in southeast Asia.[51]

However, even if their intent be clear, "area resolutions," like the Tonkin Resolution, have also been criticized for unconstitutionally delegating Congressional war power to the President.[52] It is said that they permit the President to use force without specific enough guidelines. However, this argument is hardly compelling.

In the first place, area resolutions are in fact quite specific in describing the area to be defended.[53]

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[50] See my chap. 8, supra.

[51] Ibid.

[52] See Francis D. Wormuth, "The Vietnam War: The President Versus the Constitution," in Richard A. Falk, ed., The Vietnam War and International Law, 4 vols. (Princeton, N. J.: Princeton University Press, 1968-1976), 2(1969): 781-99.

[53] The Tonkin Resolution applied only to SEATO signatories and protocol states. 78 Stat. 384 (1964).

They are perforce less specific respecting the adversary to be defended against, and the time when the use of force may begin. However, a "whereas" clause in the Tonkin Resolution indicated that the "Communist regime in North Vietnam" was committing aggression, and section 3 permitted Congress to terminate the Resolution at any time by concurrent (veto-proof) resolution.[54]

Secondly, I thought it settled that the standards for delegation of power were more relaxed in matters of foreign as opposed to domestic affairs ever since the Curtiss-Wright decision.[55] There the Supreme Court noted the following:

> Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.[56]

All told, legal arguments against the authorization of force by area resolutions (policy considerations notwithstanding) are unconvincing. In conclusion, while a

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[54] 78 Stat. 384 (1964).

[55] United States v. Curtiss-Wright Export Corp., 299 U. S. 304 (1936).

[56] Ibid., p. 324. For a discussion of more recent holdings pertaining to delegation, see Rostow, pp. 887-90.

treaty alone cannot authorize the President to commence war, a treaty and an area resolution combined, as with Vietnam, or even an area resolution alone is a legitimate vehicle for Congress to use to warrant Presidential use of force.

In the case of Vietnam, however, fighting went on after the Tonkin Resolution had been repealed by Congress in 1971. The Nixon administration denied it was ever dependent upon the Resolution for constitutional authority to pursue its policies in Vietnam.[57] In the absence of the Resolution, however, the President could only rely upon his own authority as Commander-in-Chief and whatever authority could be inferred from acts of Congress such as defense appropriations.

Under these authorities it is doubtful that the President had legal justification to do more than withdraw American forces with due regard for their safety. While the Nixon administration did remove ground combat forces steadily, it continued to wage the air war, even conducting it over Cambodia after the signing of the cease-fire. Ultimately, Congress cut off all appropriations for combat activities in southeast Asia.[58]

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[57] See chap. 8, note 130, supra.

[58] See chap. 8, note 86 and accompanying text, supra.

Actually, the issue raised by the above events is more properly related to the President's authority in the conduct or termination of a war, rather than the commencement thereof. As a general rule, war, in the constitutional sense, may not be commenced or conducted in the absence of Congressional authorization. However, the Commander-in-Chief has the obligation to use force even without such authorization where the defense of the nation or the protection of armed forces already in combat require it.

Under this analysis, when American ground forces were safely extricated from southeast Asia (March 1973), the air attacks could no longer be justified. To draw an analogy with another incident detailed in this study, after the Armistice ending World War I was agreed to in November 1918, President Wilson could no longer justify maintaining United States troops in Siberia and north Russia.[59]

Provided there is no infringement of the President's constitutional authority to provide for the protection of the United States, its forces and citizens, Congress may regulate and restrict the conduct of war by the Commander in Chief. The Supreme Court so ruled in the Little Case,[60] and, by implication, in the Steel Seizure Case.[61]

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[59] See chap. 6, supra.

[60] Little v. Barreme, 2 Cr. (U. S.) 169 (1804).

[61] Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952).

Congress asserted this power recently, and probably excessively, in the War Powers Resolution.[62]

A Theory of Presidential War-Commencing Power

Having surveyed the views of the Framers of the Constitution, developments in the "Constitution of practice," and the few relevant court opinions, we may now develop a theory of Presidential power to commence war under the Constitution. This theory will outline the areas where Presidents have legitimate claims to exercise authority. Thus, what follows is not simply a description of Presidential claims to power, but rather a combination of what Justice Frankfurter called the "words of the Constitution and . . . the gloss which life has written upon them."[63]

There are three elements in the theory: (1) emergency authority, (2) authority to enforce treaties, and (3) authority to carry out United States foreign policy. Each will be discussed in turn.

(1) There can be little doubt that the President may respond unilaterally (i.e., in the absence of Congressional authority) to certain emergency situations. He may

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[62]Pub. L. 93-148, 87 Stat. 555 (1973). See chap. 9, supra.

[63]Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 610-611 (1952).

not only use force in these circumstances, but use force tantamount to war in the Constitutional sense of the term.

The circumstances include attacks or imminent attacks upon the nation, its territories or possessions, or its armed forces, even if stationed overseas.

Furthermore, he may also employ force short of war in the Constitutional sense should there be an attack on or threat to American citizens or their property on the high seas or in a foreign nation. Should war in the Constitutional sense follow, the President would be obligated to obtain Congressional authorization in order to conduct it.

The rationale for requiring Congressional authorization in cases of war stemming from attacks upon citizens or property, but not in cases of attacks upon American territory or troops, is that the latter is likely to be a more serious threat to the nation.

This is the only legitimate exception to the general rule that war in the Constitutional sense must be authorized by Congress. The exception is based upon the President's ability to respond quickly in cases of grave national peril.

(2) Equally, there is little doubt that as Chief Executive and Commander-in-Chief, the President may employ force in order to execute treaty provisions. However, a treaty alone bestows no authority to commence war in the

Constitutional sense. Should war ensue as a result of such a use of force, the President would be obligated to obtain Congressional authorization.

(3) "The President," John Marshall said while in Congress, "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[64] Although the Framers were unclear or divided (witness the Pacificus-Helvidius debate) on the question of control over foreign relations, the President has at various times in American history predominated.

It is no longer doubted that the President may deploy the armed forces for non-hostile purposes anywhere in the world. Congress conceded as much in the War Powers Resolution, where legislative authority to terminate troop commitments was asserted only where hostilities or imminent hostilities are involved.[65]

It would also seem beyond doubt that the President may deploy the armed forces so as to threaten the use of force in the conduct of the foreign relations of the United States. However, any hostilities ensuing as a result of such deployments are not within the exclusive power of the

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[64] U. S., Congress, Debates and Proceedings in the Congress of the United States, 1789-1824 (Washington: Gales and Seaton, 1834-1856), 10:613 (1800). The Supreme Court reconfirmed this in United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 319 (1936).

[65] 87 Stat. 555-556 (1973).

President to conduct. Rather, both Congress and the President have concurrent authority to control hostilities short of war where (a) a treaty provision is not being enforced, and (b) there is no national emergency as described in section one, above.

In the absence of Congressional regulations to the contrary, the President has full authority to commence hostilities short of war in the course of the conduct of United States foreign relations. With the exception of the enforcement of treaty provisions, and certain defensive operations, however, Congress is entitled to the last word on this subject. The War Powers Resolution may be viewed as an assertion of Congressional authority to regulate hostilities short of war, while tacitly recognizing Presidential power in this area.

Should war in the Constitutional sense develop out of the hostilities or troop deployments issuing out of the conduct of foreign relations, Congress would have to authorize it.

I do not believe that Congress has the power to restrict the President in the areas of his exclusive control. These areas are: (1) the use of force short of war to protect United States citizens or their property; (2) the use of force up to and including force tantamount to war in the Constitutional sense to protect the nation, its territories, possessions and armed forces; (3) the use of force short of

war to implement treaty provisions; (4) the deployment of troops for non-hostile purposes; and (5) the deployment of troops so as to threaten the use of force for diplomatic purposes.

To the extent that the War Powers Resolution is intended to restrict the President in these areas of exclusive control the Resolution is unconstitutional.[66]

One obvious difficulty with the three-part theory outlined above is the inability to distinguish with precision "war" and hostilities short of war. I have suggested a "magnitude" test;[67] however, I am not confident that a precise distinction can be made in the abstract.

Another likely objection to this theory is that it opens the door to too many abuses of power by the President. For example, I have urged that the use of force to protect American forces is within the exclusive province of the President. However, President Nixon justified the controversial Cambodian Incursion of 1970 on the grounds that as Commander-in-Chief he had the duty and power to protect United States troops in Vietnam.[68]

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[66] See my chap. 9, supra.

[67] See text accompanying notes 11 and 46, supra. Cf. the testimony of John Norton Moore in U. S., Congress, Senate, War Powers Legislation, Hearings Before the Committee on Foreign Relations, 92d Cong., 1st sess., 1971, p. 465.

[68] Department of State Bulletin 62 (May 18, 1970): 617.

But the answer to this objection is not only that all power invites abuse, but also that over the course of American history the legislative branch has not been less inclined toward war than the executive branch. In fact, this study indicates that at the start of every conflict Congress is at least as "hawkish" as the President.[69]

This being the case, Congress is more likely to support the initial use of force rather than oppose it, or even press for escalation in order to obtain a quick or sure victory. (That this occurs is often forgotten. But consider the support for General MacArthur's expansive Korean strategy.) In short, Congress may not be a very reliable check upon the President at the commencement of hostilities. (The Cambodian Incursion is no exception; it occurred in the middle of an on-going war.)

Furthermore, placing too many checks upon Presidential power has risks for the conduct of American diplomacy, especially in a crisis situation. Consider the disadvantages of a handcuffed Presidency in the midst of a Cuban Missile affair; that would be to truly render the Constitution a "suicide pact."[70] (On the other hand do we want one

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[69]Cf. the views of Senator John Sherman Cooper (D-Ky.) in U. S., Congress, Senate, War Powers, S. Rept. 606 to Accompany S. 2956, 92d Cong., 2d sess., 1972, p. 32.

[70]"There is danger," warned Justice Jackson in a freedom of speech case, "that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact." Terminiello v. Chicago, 337 U. S. 1, 37 (1949) (dissenting opinion). The risks would seem even greater where war powers are involved.

man to make the awesome decisions that could lead to nuclear war?)

The Constitutional ideal, and the ideal of this theory is the cooperation of the branches in the decision to make war. The President can cooperate by consulting with Congress, in the most meaningful sense of the word. He can keep Congress informed, and he can request legislative support before taking action.

For its part, the legislature can support the President any number of ways short of a full-blown declaration of war, including the use of "area resolutions" as authority for the conduct of war in the Constitutional sense. Congress must also appropriate funds for the conduct of foreign affairs, and although general defense appropriations are probably insufficient to authorize the conduct of war proper, Congress is free to terminate financial support if it disapproves of an activity.[71]

Legal arguments aside, the absence of inter-branch cooperation in war-making is politically risky for the President, as Presidents Johnson and Nixon found out. Although, as the case of Lyndon Johnson demonstrates, Congressional cooperation upon the commencement of a conflict is no assurance of support thereafter.

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[71] See my chap. 9, supra.

Nevertheless, while Congress may be fickle, it is prudent for a President to have its support at the start of hostilities. In the current political climate it is more than prudent--it is essential.

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